IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

THE SHAWNEE COMPRESS COMPANY, THE GULF COMPRESS COMPANY, T. F. STUBBS, *et al.*, *Appellants*,

vs.

NEIL P. ANDERSON, B. L. ANDERSON and MORRIS E. BURNEY, Copartners as NEIL P. ANDERSON & COMPANY, and F. E. ANDERSON, M. D. ANDERSON and W. L. CLAYTON, Copartners as ANDERSON, CLAYTON & COMPANY, *Appellees*

No. 140.

BRIEF FOR APPELLEES.

This case is brought to this court upon appeal from the Supreme Court of the Territory of Oklahoma, wherein the judgment of the court was reversed and the cause remanded to the District Court of Pottawatomie County with instructions for that court to render judgment in favor of the appellees, in conformity with the opinion of the Supreme Court of Oklahoma and the prayer of the amended petition.

Statement of Facts.

The appellees filed their verified petition (R., 10–14) May 2, 1905, in the District Court of Pottawatomie County, Oklahoma, alleging in substance the following facts:

1. That the firm of Neil P. Anderson & Company (copartners) owned sixty-nine shares of the capital stock of appellant Shawnee Compress Company, and that the firm of Anderson, Clayton & Company (copartners) owned sixty-four shares of the capital stock of said appellant.

2. That said Shawnee Compress Company is a corporation organized under the laws of Oklahoma, with a present capital stock of $50,000, divided into shares of $100 each, and that all of said stock has been subscribed and issued; that appellant T. F. Stubbs claims to be president of said company, and assumes to act as such, and appellant W. H. Beatty claims to be secretary thereof, and assumes to act as such; that appellant J. M. Aydelotte claimed to be president thereof, and assumed to act as such for several years immediately prior to April 24, 1905; that appellant Gulf Compress Company is a corporation created and existing under and by virtue of the laws of the State of Alabama, and appellant C. C. Hanson claims to be president thereof, and assumes to act as such, and R. E. L. Martin claims to be and assumes to act as secretary thereof.

3. That sometime prior to April 13, 1905, certain of the stockholders, acting and claiming to be officers of

the said Shawnee Compress Company, fraudulently and illegally conceived the idea of leasing the entire property and business of said company, together with its good will and right to operate same, to said Gulf Compress Company. On the said 13th day of April, 1905, said J. M. Aydelotte, assuming to act as president of said Shawnee Compress Company, sent to said Neil P. Anderson & Co., and to Anderson, Clayton & Co., a pretended notice stating that there would be a special meeting of the stockholders of said Shawnee Compress Company on April 24, 1905, at 11 o'clock A. M., which said notice is attached as "Exhibit A" thereof, but utterly failed to state any purpose for which said meeting was called (R., 14); that at said pretended meeting of stockholders, held on said 24th day of April, 1905, in pursuance of said notice, certain of said stockholders of said company (W. H. Beatty, T. F. Stubbs and C. J. Benson) assuming to represent a majority of the stock of said company, over the protest and objection of the appellees, and without any legal excuse therefor, assumed to pass a motion to accept a certain proposition made by the said Gulf Compress Company for the leasing of the entire business, good will, property, franchise, etc, of said Shawnee Compress Company for a period of five years, at a stipulated rental of $6,000.00 per year, and that said stockholders so claiming and assuming to represent a majority of the stock of said company also passed a certain resolution pretending to amend the by-laws of said company so as to provide for a board of directors of only three members, and thereupon assumed to elect as such board of

directors, by resolution, appellee F. E. Anderson and appellants T. F. Stubbs and W. H. Beatty, and that the minutes of said stockholders' meeting, kept by said Beatty, claiming to act as secretary thereof, are incorrect in stating that election of said directors was by ballot and that said F. E. Anderson and B. L. Anderson voted on the proposition to amend said by-laws and elect a board of directors consisting of only three members (R., 16 and 28).

4. That following the said pretended stockholders' meeting the said pretended board of directors, consisting of said three members, held a pretended meeting on April 24, 1905, but did not attempt any action relating to the leasing of the property, business, good will, etc., of said Shawnee Compress Company (R., 16 and 28); that thereafter, and on the 25th day of April, 1905, said T. F. Stubbs and W. H. Beatty, assuming to act as president and secretary, respectively, of the said Shawnee Compress Company, wired said F. E. Anderson to the effect that a special meeting of said pretended board of directors would be held in the city of Shawnee on April 26, 1905, at 4 o'clock P. M., but said F. E. Anderson did not attend said meeting, yet the said Stubbs and Beatty, assuming to act as majority of the board of directors of said Shawnee Compress Co., pretended to hold a meeting and, thereat, to pass a certain resolution authorizing themselves, as president and secretary of said company, respectively, to execute such lease to said Gulf Compress Company (R., 17); that thereafter, on the said 26th day of April, 1905, the

said Stubbs and Beatty, so assuming to act as president and secretary, respectively, of said Shawnee Compress Company, sent a notice to said F. E. Anderson, stating that a meeting of said pretended board of directors of the Shawnee Compress Company would be held at its office in the city of Shawnee on May 1, 1905, at the hour of 4 o'clock P. M., to transact any business which might come before the meeting (R., 17); and on the same date, to wit., April 26, 1905, the said Stubbs and Beatty, so assuming to act as president and secretary of said Shawnee Compress Company, pretended to execute a written lease to said Gulf Compress Company for the period of five years, at the stipulated rental of $6,000 per annum, and which pretended contract of lease consists of thirteen paragraphs and contains many fraudulent and illegal provisions—special attention is now called to paragraph 6 thereof as follows: "The landlord (Shawnee Compress Company) shall not, during the term of this lease, without the consent of the tenant (Gulf Compress Company), directly or indirectly engage in the compression of cotton within fifty miles of any plant operated by the tenant" (Gulf Compress Company) (R., 19); and also a part of paragraph 10 thereof as follows: "The landlord (Shawnee Compress Company) agrees and pledges the tenant (Gulf Compress Company) its good-will, moral and real support, and that it, individually and collectively, will render the tenant (Gulf Compress Company) every assistance in discouraging unreasonable and unnecessary competition" (R., 20).

5. That thereafter on said 1st day of May, 1905, in

pursuance of said pretended notice said F. E. Anderson, T. F. Stubbs and W. H. Beatty met at the office of said Shawnee Compress Company, in the said city of Shawnee, but said Anderson immediately, upon the calling of said meeting to order, declined to participate therein and filed a written protest, challenging the legality of said meeting and the authority of the members of the said pretended board of directors to act as such upon the grounds, among others, that said pretended said members of said board had never been legally elected or chosen, and that said parties had no legal power or authority whatever to act as a board of directors of said Shawnee Compress Company (R., 22); but the said Stubbs and Beatty, over the said written protest and objection of said Anderson, assuming to act as a majority of the members of the said board of directors, proceeded to pass certain pretended resolutions authorizing the leasing, by themselves as president and secretary, respectively, of said Shawnee Compress Company of its entire property, business, franchise, good will, etc. (R., 23–24).

6. That all the proceedings had at the said pretended stockholders' meeting of said Shawnee Compress Company of April 24, 1905, and of the said pretended directors' meeting of April 24, 26 and May 1, 1905, pretending to authorize the leasing of said property, business, good will, etc., of the said Shawnee Compress Co., are wholly illegal and beyond the powers of the said stockholders and directors of said corporation; that the purposes for which said corporation was organized are to construct and operate a cotton compress in the said city

of Shawnee, for the purpose of receiving, compressing, weighing, storing, buying, handling, selling and ginning cotton; that the said pretended board of directors which were attempted to be selected and chosen at the said pretended stockholders' meeting of April 24, 1905, were never legally elected and have no power or authority to represent said Shawnee Compress Co., as its board of directors, under the articles of incorporation and by-laws of said company, and that the said parties so claiming to constitute said board of directors of said company and assuming to act therefor have no legal power or authority to bind same to the said pretended lease contract, and that said contract is void as against the rights of these appellees, they being minority stockholders of said Shawnee Compress Co. (R., 13).

Appellees thereupon prayed that the said pretended lease contract be declared null and void and, therefore, cancelled and set aside, and that said T. F. Stubbs and W. H. Beatty be enjoined from assuming to act as president and secretary of said company and from executing or taking any further proceedings of any kind whatever looking to the execution of a lease of the property, business, etc., of said Shawnee Compress Co. to the said Gulf Compress Co., and from turning over any of the property of said former company to the latter, and for all other just and equitable relief, and that, in the meantime, a temporary injunction be granted against said Stubbs and Beatty as such officers (R., 13–14).

This petition was presented to the probate judge of said Pottawatomie county and, upon proper showing be-

ing made of the absence of the district judge therefrom, a temporary injunction against said Beatty and Stubbs as prayed for in said petition, was granted by said probate judge (R., 25–26).

Thereafter and on May 13, 1905, said appellees filed in said cause their amended petition restating all the facts alleged in their said original petition in more detail and adding thereto two additional paragraphs (numbered 4 and 5 of said amended petition), charging, in substance, that the purpose of said Stubbs and Beatty, and of certain of the other stockholders who joined with them in the efforts to procure the negotiations of said lease to the Gulf Compress Co., was not for the purpose of advancing the interests of said Shawnee Compress Co., but in the supposed personal interests of said Stubbs and Beatty, and that, in any event, there were no exigences of the business of said Shawnee Compress Co., requiring the negotiations of such lease, as its net earnings for the previous season (1904–5) were, as shown by the statement of the secretary and treasurer thereof, the sum of $7,485.59; and also that the purpose of the officers of the Gulf Compress Co. in procuring such lease was to secure a monopoly of the compressing business on behalf of said latter company and to further restrict competition between the compresses already operated by said company and the said compress previously owned and operated by the said Shawnee Compress Co., and that the said pretended lease contract from the said Shawnee Compress Co. to said Gulf Compress Co. is null and void for the additional reason that it was so executed

for the purpose of so restricting competition in the said compressing business (R., 26–32, especially paragraphs 4 and 5 of said amended petition).

That thereafter and on said May 13, 1905, appellants Shawnee Compress Co., Gulf Compress Co., and Stubbs, Beatty and Aydelotte filed in said cause their demurrer to the amended petition of plaintiffs, on the ground of a defect of parties plaintiff and defendant; "that there is a misjoiner of causes of action, and that same does not state facts sufficient to constitute a cause of action," and also specifically to paragraphs 4, 5 and 6 of said petition, on the ground that neither of same state facts sufficient to constitute a cause of action.

Thereafter and on May 27, 1905, said demurrer was overruled, and thereafter and on the same date appellants Shawnee Compress Co., Gulf Compress Co., Beatty, Stubbs, Aydelotte and Hanson filed their answer to said amended petition, containing, in substance, the following material allegations:

1. A general denial of each of the allegations of said petition, except such as thereinafter are specifically admitted.

2. Specifically admitting the incorporation of the said Shawnee Compress Co. under the laws of the Territory of Oklahoma, with a capital of $50,000, and the incorporation of the said Gulf Compress Co. under the laws of the State of Alabama, and, in various subsequent portions of said answer, effectively admitting all of the exhibits referred to and set out as parts of both the original and amended petitions of appellees and marked

Exhibits A, B, C, D, E, F, G and H, respectively, of each of said petitions (R., 14–24), and that appellees are copartners under the firm names of Neil P. Anderson & Co. and Anderson, Clayton & Co., and owned stock in said Shawnee Compress Co., as in said amended petition alleged.

3. That said W. H. Beatty and T. F. Stubbs were, on the date of said stockholders' meeting of April 24, 1905, and for more than ten days prior thereto, each the owner of 133 shares of the capital stock of said Shawnee Compress Co. (R., 35).

4. That said Shawnee Compress Co. was, and has been for more than one year last past, indebted to the Webb Compress Co., Ltd., in the sum of $11,250, and to the Shawnee National Bank in the sum of $6,000.00, and that all of said indebtedness was past due since January 1, 1905, and that each of said creditors was pressing and demanding payment of said indebtedness and threatening to enforce such payment by legal proceedings (R., 35).

5. That at the said stockholders' meeting of April 24, 1905, the stockholders of said Shawnee Compress Co. elected a board of directors, composed of W. H. Beatty, T. F. Stubbs and F. E. Anderson, and that each of said parties accepted the duties imposed upon him as such director, and that they have continued since said date to act as such, and that they were so elected by the unanimous vote of the stockholders present at said meeting (R., 35).

6. That the 69 shares of stock owned by said Neil P. Anderson & Co. had always been represented and voted

at stockholders' meetings of said Shawnee Compress Co. by said B. L. Anderson, as agent of said firm and one of the copartners therein, and that the 64 shares of stock owned by said Anderson, Clayton & Co. had always been represented and voted at stockholders' meetings of said Shawnee Compress Co. by F. E. Anderson, as agent of said firm and one of the copartners therein (R., 35–36).

7. That at the said stockholders' meeting of April 24, 1905, said W. H. Beatty, as secretary of said Shawnee Compress Co., reported to the stockholders present that the $6,000.00 due the Shawnee National Bank could be procured as a loan from the Gulf Compress Co., and an extension of the time of payment of the indebtedness due the Webb Compress Co., Ltd., could be procured by said Gulf Compress Co., on behalf of said Shawnee Compress Co., upon the latter company executing to the former a lease for the period of five years, at the annual rental of $6,000, and that after a full consideration of said proposition, in which said B. L. Anderson and F. E. Anderson participated, said stockholders present at said meeting appointed from among their number a committee composed of C. J. Benson, W. H. Beatty and F. E. Anderson, to confer with the officers of the Gulf Compress Co., and to obtain a higher rental from said company if possible, and, if not, then to accept said proposition made by the said Gulf Compress Co., " and that pursuant to the authority conferred therein " a meeting of the board of directors of said Shawnee Compress Co. was called for April 26, 1905, at which time the said matters were considered and the said committee reported to said board

which authorized the president and secretary of the Shawnee Compress Co. to enter into said lease on its behalf, and that because of the absence of F. E. Anderson a subsequent meeting of said board of directors was called for May 1, 1905, at the hour of 4 o'clock P. M., which said meeting was attended by all of the three members thereof (R., 36).

8. That they expressly deny that the minutes of said stockholders' meeting of April 24, 1905, are false or untrue, except that the words "by ballot" were erroneously inserted therein (R., 36).

9. That at the said meeting of the board of directors of May 1, 1905, said board accepted the proposition of lease tendered by said Gulf Compress Co., and the president and secretary of said Shawnee Compress Co. executed and delivered same to the Gulf Compress Co. (R., 37).

10. That the execution of said lease was necessary in order to procure money to pay the indebtedness of said Shawnee Compress Co., and to procure an extension of time of payment of the indebtedness due the Webb Compress Co., Ltd., and that said lease was in all respects valid, regular and authorized by law, and is still valid and binding upon said appellants; that the consideration therein paid was fair and reasonable and for the best interests of the stockholders of said company, and that appellants could procure said second mortgage money in no other way and the property of the said Shawnee Compress Co., would have been sold at a great sacrifice unless said lease was made (R., 37).

11. Appellants allege, as affirmative defenses, or rather in the way of avoidance, various other matters, charging the appellees with having entered into a conspiracy to injure Messrs. Beatty and Stubbs and the stockholders of said Shawnee Compress Co., other than themselves; to injure, harrass and annoy the said Gulf Compress Co., and to prevent it from carrying on its business of compressing cotton in the Territory of Oklahoma; and to depress the value of the stock and properties of said Shawnee Compress Co., and thereby procure a sale of one or the other of themselves (R., 37, 38, 39, paragraphs 12, 13, 14 and 15 of answer), but as there was no material evidence tending to substantiate any of these allegations they are passed without further notice or comment.

12. That said Neil P. Anderson & Co., by reason of their agent, having participated in the stockholders' meeting of April 24, 1905, and Anderson, Clayton & Co., by reason of their agent, having participated in said meeting, and also having participated in subsequent meetings of the board of directors of said Shawnee Compress Co. as a member thereof, are estopped from denying that all of said meetings were regularly called, and that the said action of the stockholders and directors of said company are in all respects legal, and have been, by all its stockholders, duly and regularly ratified, and are now binding upon said corporation (R., 40, paragraph 16 of answer). Wherefore appellants pray that said injunction be dissolved and that they recover costs and attorneys' fees, and for such other relief as the premises justify.

Thereafter, and on said May 27, 1905, appellees filed

in said cause their demurrer to paragraphs 12 and 13 of the said answer of appellants, for the reason that neither of said paragraphs states facts sufficient to constitute a ground of defense (R., 41), and thereafter, and on the same date, said demurrer was overruled by the court, to which appellees duly excepted (R., 41–42); that thereafter, and on the same date, appellees filed in said cause their reply to the answer of appellants, denying each and every material allegation of new matter therein contained which is in conflict with or contradictory to any of the allegations of their said amended petition (R., 42); thereafter, and on the 16th day of September, 1905, appellees made application to the court for leave to file an amendment to paragraph 5 of their said amended petition, which leave was granted as to the first clause thereof alleging more specifically that the said Gulf Compress Co. constitutes, in its operation and method of doing business, a monopoly and trust in restraint of trade and commerce, and also that the said Gulf Compress Co., C.C. Hanson, its president, and R. E. L. Martin, its secretary, have, by the attempted execution of the pretended lease contract, entered into a fraudulent combination in restraint of trade with the said Shawnee Compress Co., and T. F. Stubbs, as its president, and W. H. Beatty, as its secretary, in violation of both the Federal and Territorial statutes (R., 43–44).

Said action was tried by the court and resulted on September 20, 1905, in a judgment for appellants dissolving the temporary injunction, dismissing appellees' amended petition and taxing the costs of said action to

appellees; and, on the same date, appellees filed their motion for a new trial, which was duly overruled (R., 210); from which said judgment and order appellees commenced their proceeding in error by filing in the Supreme Court of Oklahoma the record consisting of petition in error and case—made on October 20, 1905.

ARGUMENT.

I.

It is contended on behalf of the appellants that the Supreme Court of Oklahoma Territory erred in holding that the contract of lease from the Shawnee Compress Company to the Gulf Compress Company of April 26, 1905 (R., 18–21), tended to create a combination unreasonably in restraint of trade, the prevention of competition and the establishment of a monopoly, therefore being against public policy. The appellees are clearly of the opinion that on that branch of the case the decision was right, and a careful analysis of the facts shows that the Supreme Court of the Territory properly held the contract illegal.

The law applicable to this case comes from three sources:

a. The Act of Congress 26 Stat. at Large, 209, Chap. 647:

SEC. 3. "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia * * * is hereby declared illegal."

b. The statute of Oklahoma applicable thereto (Wilson's Statutes, Sections 819 and 820).

SEC. 819. "Every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by the next two sections, is to that extent void.

SEC. 820. "One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city or part thereof, so long as the buyer, or any person deriving title to the good-will from him carries on a like business therein."

c. The common law which declares all contracts in unreasonable restraint of trade to be contrary to public policy and void.

The Act of Congress referred to does not say or mean every contract in *unreasonable restraint* of trade, but *every* contract in *restraint* of trade.

In the case of (1906) Pocahontas Coke Co. *vs.* Powhatan Coal and C. Co., 60 W. Va., 508; 56 S. E., 264; 10 L. R. A. (N. S.) 268, 281, the court said:

> "It may be said in this connection that the determination of the question whether or not a contract is in restraint of trade is to be arrived at in exactly the same way and under exactly the same rules, whether the case falls under the provision of the act of Congress or under the rules of the common law. The difference between the act and the common law does not lie in the manner of ascertaining whether or not restraint exists, but in the degree of restraint required to render the contract illegal.

> Under the act of Congress any restraintis illegal, while, under the common law, only unreasonable restraint is illegal."

The contract in the case at bar provided for a lease for five years, at an annual rental of $6,000, and also that "The landlord (Shawnee Compress Company) shall not, during the term of this lease, without the consent of the tenant (Gulf Compress Company) directly or indirectly engage in the compression of cotton within fifty miles of any plant operated by the tenant (Gulf Compress Company) (R., 19). * * * "The landlord (Shawnee Compress Company) agrees and pledges the tenant (Gulf Compress Company) its good-will, moral and real support, and that it, individually and collectively, will render the tenant (Gulf Compress Company) every assistance in discouraging unreasonable and unnecessary competition" (R., 20).

In Addyston Pipe and Steel Co. *vs.* United States (175 U. S., 211), Mr. Justice Peckham, in delivering the opinion of the court, said:

> "We have no doubt that where the immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity. * * * The question is as to the effect of such combination upon the trade in the article, and if that effect be to destroy competition, and thus advance the price, the combination is one in restraint of trade."

"Though there be an apparent main lawful contract yet, if its obvious purpose and necessary result are to establish a monopoly, the contract is void. * * * It is deducible from the authorities that if the direct and necessary or natural effect of a contract or combination among producers and sellers of a commodity is to restrain competition and control prices, to the injury of the public, when all the powers of the contract or combination have been exercised, the contract or combination is in unreasonable restraint of trade and against public policy. * * * A contract which is charged to be in restraint of trade is not to be tested by what has been done under it, but by what may be done under it; not by its performance, but by its powers of performance when fully exercised. * * * The illegality of a contract or combination for the restraint of competition does not lie in the agreement not to compete but in its reflex injury to the public. One way to control prices is to destroy or restrain competition. It has been said that many of the cases decided in America, holding contracts valid as not being in unreasonable restraint of trade, would have been held otherwise if the modern doctrine as to restraint of competition had been properly applied."

Pocahontas Coke Co. *vs.* Powhatan Coal, etc., Co., *supra.*

Other facts leading inevitably to the conclusion reached by the Supreme Court of Oklahoma on this proposition may be referred to briefly. On April 18, 1905, in accordance with the previous arrangement between them, C. C. Hanson, as president of the Gulf Compress Company, wrote to said Beatty, as secretary of

Shawnee Compress Company, submitting a written proposition to lease the entire physical property, as well as the business and good will of said Shawnee Compress Company for the period of five years, and in said written proposition and as a material inducement to procure the execution of such lease on the part of the Shawnee Compress Company made the following suggestions, to wit: "In making this formal offer, I desire to submit a few reasons why, as I see it, you can afford to lease us your property for a term of five years, at the figures offered, or say, possibly less than the plant is now netting you or what may be considered as the net income in sight during the next five years. Our getting together on a lease proposition means the avoiding for each other, directly or indirectly, of the possibility, if not probability, of unnecessary competition" (R., 197).

While testifying as a witness on behalf of appellees Mr. Hanson, when his attention was called to this particular provision of his said written proposition, admits that it was one of his purposes in procuring the execution of said lease to prevent what he termed "unnecessary competition," his testimony concerning this matter being, in part, as follows:

> "A. We are operating a press to day in Oklahoma City and did last season, and our operation there explains what I had in mind.
>
> "Q. So then you did want to lease this press to avoid competition between the company operating it here and your company?
>
> "A. I will say unnecessary competition, but not competition.

"Q. Well, where is the line drawn between competition and unnecessary competition?

"A. Well, one is unnecessary competition where you are doing so much for nothing and you soon become bankrupt.

"Q. Don't make the proper profits?

"A. When you become bankrupt, that creates unnecessary competition" (R., 62).

Referring to the personal negotiations which he had previously with Mr. Beatty relative to the matter of the execution of the proposed lease, Mr. Hanson testified, in part, as follows:

"Q Now Mr. Beatty went to Memphis to consult with you at your request, I believe you said?

"A. I said so, but since reflecting over the matter I believe that Mr. Beattty wrote me first and made an appointment to come over. This morning I was in doubt, but that strikes me as being the fact now.

"Q. Well, while he was there you discussed this whole matter, did you, about the advantages and disadvantages of the lease contract?

"A. I don't recollect any detailed discussion; I would say, yes, ordinarily.

"Q. And the matter which you designate as unnecessary competition between your compress at Oklahoma City, and the plant here also was discussed, was it?

"A. I would say yes. I don't recollect specifically.

"Q. Who drew the lease contract?

"A. I did (R., 68)."

See also his testimony (R., 85) relating to the same matter.

That the two provisions of said lease contract hereinbefore quoted are void, as being in unlawful restraint of trade and business, will not be questioned (Hulen *vs.* Earel (Okla., 73 Pac., 927); but, it is contended by counsel for appellants that the fact of these two provisions being illegal and void will not render the entire lease contract void, and, consequently, all the other provisions thereof are valid and inforcible; but this is not the rule where an illegal or otherwise void provision of a contract forms such part of the inducement or consideration as (without it) it cannot be definitely determined that the remaining portion of such contract would have been entered into.

SEC. 810, Okla. Stat., 1893 (Wilson's Stat., Sec. 767), provides that, "If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void." In view of the evidence hereinbefore cited, it certainly cannot be judicially determined that any portion of the lease contract involved in the case at bar would unquestionably have been entered into regardless of the two provisions hereinbefore quoted providing for such illegal restraint of trade and competition, hence the entire contract must fall.

Bishop *vs.* Palmer, 146 Mass., 469, 16 N. E., 299.
Western-Wooden Ware Ass'n *vs.* Starkey, 84 Mich., 76, 47 N. W., 604.
Saratoga Co. Bank *vs.* King, 44 N. Y., 87.
Consumer's Oil Co. *vs.* Nunnemaker, 142 Ind., 560, 41 N. E., 1048.
More *vs.* Bonnet, 40 Cal., 251.
Frost *vs.* More, *Ibid.*, 347.

In the opinion of the court in the case of Bishop *vs.* Palmer, *supra*, it is declared that:

> "The defendants' promise which is declared on was made in consideration of the sale and delivery of the business, plant, property, and contracts of the plaintiff, and the faithful performance of the covenants and agreements contained in the written instrument signed by the parties. The parties made no apportionment or separate valuation of the different elements of the consideration. The business, plant, property, contracts, and covenants were all combined as forming one entire consideration. There is no way of ascertaining what valuation was put by the parties upon either portion of it. There is no suggestion that there was any such separate valuation, and any estimate which might now be put upon any item would not be the estimate of the parties. It is contended by the defendants that each one of the three particular covenants and agreements into which the plaintiff entered is illegal and void, as being in restraint of trade. It is sufficient for us to say that the first of them is clearly so. It being a general agreement, without any limitation of space, that, for and during the period of five years, he will not, either directly or indirectly, continue in, carry on, or engage in, the business of manufacturing or dealing in bed-quilts or comfortables, or of any business of which that may form any part. Thus much is virtually conceded by the plaintiff, and so are the authorities.
>
> "Two principal grounds on which such contracts are held to be void are that they tend to deprive the public of the services of men in the employments and capacities in which they may be most useful,

and that they expose the public to the evils of monopoly. * * * The question then arises whether an action can be supported upon the promise of the defendants founded upon such a consideration as that which has been described. As a general rule, where a promise is made for one entire consideration a part of which is fraudulent, immoral or unlawful, and there has been no apportionment made, or means of apportionment furnished, by the parties themselves, it is well settled that no action will lie upon the promise. If the bad part of the consideration is not severable from the good, the whole promise fails. * * *

"It is urged that this rule does not apply to a stipulation of this character which violates no penal statute, which contains nothing *malum in se*, and which is simply a promise enforcible at law. But a contract in restraint of trade is held to be void because it tends to the prejudice of the public. It is, therefore, deemed by the law to be not merely an insufficient or invalid consideration, but a vicious one. Being so, it rests on the same ground as if such contracts were forbidden by positive statutes. They are forbidden by the common law, and are held to be illegal."

In Saratoga County Bank *vs.* King, *supra*, it is held that—

"A contract in illegal restraint of trade is wholly void when the illegal covenants form part of the entire consideration and both parties are in fault."

In Consumer's Oil Co. *vs.* Nunnemaker, *supra*, it is held that:

"A contract by which defendant, formerly a dealer in oil in the city of H., agreed to refrain from following such occupation for five years within the State of Indiana, the city of Indianapolis excepted, is unreasonable and void as a restriction of trade."

"A contract by which one formerly dealing in oil in the city of H. agreed not to prosecute such business within the State of Indiana, the city of Indianapolis excepted, for the period of five years, is not divisible, and, being void as to the restriction within the State, is void as to the restriction within the city of H."

In More *vs.* Bonnet, *supra*, it is held that:

"A contract by which one of the parties binds himself not to engage in a particular business or occupation 'in the city and county of San Francisco, or State of California' is in restraint of trade, and therefore void, as against public policy."

"Such a contract is an entire contract, and cannot be severed so as to enforce that portion relating to the city and county of San Francisco, and reject that relating to the State of California."

"The question of whether a contract is entire or separable, can only be solved by considering both the language and the subject matter of the contract."

"A contract will generally be held to be severable when the price is expressly apportioned by the contract, or the apportionment may be implied by law to each item to be performed."

By the provisions of the lease contract under consideration, the said Shawnee Compress Co. assumes to convey, for a period of five years, all its physical property, good

will, moral and real support, etc., to the said Gulf Compress Co., and also to agree that it will not only assist the said Gulf Compress Co. "in discouraging unreasonable and unnecessary competition," but also that during the term of said lease it will not either directly or indirectly engage in the compression of cotton within fifty miles of any one of the twenty-seven or twenty-eight compresses already possessed, either as owner or lessee, and operated by the said Gulf Compress Co., which said provisions, as shown by the letter and oral testimony of Mr. Hanson, were very material considerations in inducing him to enter into said lease-contract on behalf of said Gulf Compress Co.; and applying the principles declared in the cases just cited to said provisions, there can be no reasonable doubt that same render the entire lease contract void, as being in illegal restraint of trade and competition. See also to the effect that, "A contract based upon several considerations, one of which is unlawful, is void."

Edwards Co. *vs.* Jennings, 89 Tex., 618, 35 S. W., 1053.
Gage *vs.* Fisher, 5 N. D., 297, 65 N. W., 809.
Collins *vs.* Merrell (Ky.), 2 Met., 163.
St. L. J. & Co. R. R. Co. *vs.* Mathers, 104 Ill., 257.

Furthermore, we insist that these said provisions, considered in connection with the undisputed testimony of Mr. Hanson to the effect that one of his purposes in procuring the execution of said lease on behalf of the Gulf Compress Co. was to prevent what he terms unreasonable or unnecessary competition, renders the entire lease contract void, under the provisions of Sec. 3, of Chap.

647, 26 U. S. Stat. at Large, 209, which said section is directly applicable to trade and commerce within each of the Territories of the United States and the District of Columbia, as well as to such trade and commerce between any of said Territories and other States and Territories. Of course, Mr. Hanson and the other officers of his company who are directly interested in preventing all competition with the various presses operated by said company would very naturally term any and all competition therewith unreasonable or unnecessary; but even conceding that the purpose of said officers was only to shut out or restrict such competition as might, under the common law, be properly termed unreasonable or unnecessary, still a contract, one of the purposes of which is to restrict same, is illegal under the Federal act just cited.

In the opinion of the majority of the court, in the case of the Northern Securities Company *vs.* United States, 193 U. S., 196; 48 L. Ed., 679, it is specially declared, "That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces all direct restraints imposed by any combination, conspiracy, or monopoly upon such trade or commerce;" and also, "That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition, restrains instead of promoting trade and commerce."

"That to vitiate a combination, such as the act of Congress condemns, it need not be shown that the combina-

tion, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition."

See also Western Wooden Ware Association *vs.* Starkey, *supra*, 84 Mich., 76, 47 N. W., 604.

Santa Clara Val. M. & L. Co. *vs.* Hayes, 76 Cal., 387, 18 Pac., 391.

Pacific Factor Co. *vs.* Adler, 90 Cal., 110, 27 Pac., 36.

Anheuser-Busch Brewing Association *vs.* Houck, 88 Tex., 184, 30 S. W., 869.

State *vs.* Nebraska Distilling Co., 29 Neb., 700, 46 N. W., 155.

That a minority stockholder may prevent the carrying into effect of such a contract by injunction see Stewart *vs.* Erie & Western Trans. Co., 17 Minn., 372, wherein it is held that "A dissenting stockholder may have injunction to restrain the corporation from using its powers or funds for an unauthorized purpose, or from creating a monopoly."

In connection with the proposition now under consideration it is also important to bear in mind the fact that the Gulf Compress Company had been and intends to continue charging at least ten cents per bale more for compressing cotton at its Oklahoma City plant than had ever been charged by the said Shawnee Compress Company for the same service, and said Gulf Compress

Company also intends to put on this extra charge at the Shawnee press in the event of said lease contract being held to be valid (R., 63, 65, 78, 79).

It therefore becomes plain why the Supreme Court of the Territory applying the law to the facts found the contract of lease illegal. The reasoning of that court is not the interpretation put upon it by counsel for appellants. Mr. Hanson is the president and managing officer of the Gulf Compress Company, which in 18 months had secured control of nearly all of the 27 compresses operated by that company and which was leasing if possible plants every place they could be had as rapidly as they could be leased. In about a year before this lease the capital of said company had been increased from $25,000 to $1,000,000. The same Mr. Hanson is president and manager of another corporation, the Atlantic Compress Company, which has acquired control of 25 compresses. No compress of the one of said corporations is located in the same place with the other. There is no competition between them. They divide the territory and act in concert. The brain and hand of C. C. Hanson, president, guides the affairs and destinies of both, and his chief aim appears to be to stifle "unreasonable and unnecessary competition."

Whatever may be the "independent acts" of which the Gulf Compress Company is guilty it would appear more accurate to state some of them as follows:

1. It has by its methods obtained control of 27 plants and in so doing has used $400,000 of its $1,000,000 capital in a little more than a year.

2. That it is in the market leasing plants upon the best terms it can make and has $600,000 available for that purpose.

3. That it has as its president and manager a man who controls 25 plants belonging to another corporation.

4. That it has so managed its affairs that none of its plants compete with the plants of the said other corporation.

5. That in its offer to lease and its lease of the Shawnee compress it provided specifically that the lessor should not during the life of the lease engage in business within fifty miles of any plant operated by it.

6. That it required in said lease the agreement and pledge, by the lessor, that it "individually and collectively, will render every assistance" to it "in discouraging unreasonable and unnecessary competition."

7. That at Oklahoma city it charged 10 cents per bale more than other compresses by a so called charge for additional services, and evidenced a purpose to make a like additional charge at Shawnee.

8. That by loaning to said Beatty personally the sum of $7,500 it was able to procure the said lease.

9. That the terms of the contract of lease do not obligate the Gulf Compress Company to operate the plant at Shawnee.

It is of no significance that not a single stockholder of the Gulf Compress Company owns stock in the Atlantic Compress Company, if that be the fact, because the vital question is not who owns the stock, but how the corporations contract and conduct their business.

In the cases cited by counsel for the appellants on the question of the restraint of trade cannot be found an instance where a dissenting stockholder is seeking relief. The Territory was under the direct control of Congress, therefore the Federal statute operated in a different way. In nearly every case cited the defendant had entered into a contract, received the fruits of it, and then attempted to violate it.

In the case of Fowle *vs.* Park, 131 U. S., 88, a supposedly useful remedy had been discovered. Park purchased the right from the owner to manufacture and sell the discovery in certain States, and contracted not to sell within certain other territory. He violated his contract. The court said: "The policy of the law is to encourage useful discoveries by securing their fruits to those who make them." * * * "Public welfare is first considered and if it be not involved, and the restraint upon one party is not greater than the protection to the other requires, the contract may be sustained. The question is whether under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is, or is not reasonable."

The case of Gibbs *vs.* Baltimore Gas Company, 130 U. S., 396, denies the right of recovery because one of the parties to the contract upon which the right to recover was predicated, was prohibited by statute from making such a contract. Irrespective of the statute recovery would probably have been denied.

In the case of Richards *vs.* Seating Co., 87 Wis., 503, the court said:

"The test as to whether the restraint is reasonable or not is well expressed in the often cited case of Horner *vs.* Graves, 7 Bing., 735, where it is said: 'The question is whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive; and, if oppressive, it is in the eye of the law unreasonable.' It is said, in substance, in many cases that all restraints are presumed to be bad, but if the circumstances are set forth that presumption may be excluded, and the court is to judge of these circumstances whether the contract be valid or not."

In Cincinnati Packet Co. *vs.* Bay, 200 U. S., 179, the clause in contract complained of was that in the sale of certain boats the vendors agreed not to interfere with vendees' passenger and freight business between certain specific intrastate points for five years. Held valid by Ohio law, and as no question of interstate commerce arose Sherman law did not apply.

In Davis *vs.* Booth, 131 Fed., 31, Davis had sold goodwill of business and agreed not to enter into a like business in the community for a specified time. He had received valuable consideration. He violated his agreement. Held, he was bound.

It is clear that a stipulation that another shall not pursue his trade employment at such a distance from the business of the person to be protected as that it could

not possibly affect or injure him would be unreasonable and absurd.

(1873) Oregon Steam Navigation Co. *vs.* Winsor, 20 Wall, 64, 69.

In Alger *vs.* Thacher, 19 Pickering, 51, the court, referring to contracts in restraint of trade, said:

> "1. Such contracts injure the parties making them because they diminish their means of procuring a livelihood and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression.
>
> "2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves.
>
> "3. They discourage industry and enterprise, and diminish the products of ingenuity and skill.
>
> "4. They prevent competition and enhance prices.
>
> "5. They expose the public to all evils of monopoly, and this is especially applicable to wealthy companies and large corporations, who have the means, unless restrained by the law, to exclude rivalry, monopolize business and engross the market. Against evils like these wise laws protect individuals and the public by declaring all such contracts void."

II.

Said lease contract should have been declared void and injunction granted because it was beyond the scope of

the legal powers of the Shawnee Compress Company to execute the lease contract in question as alleged in both the original and amended petitions (R., 13 and 31).

The purpose for which the said Shawnee Compress Company was incorporated, as stated in paragraph 2 of its articles of incorporation, "is to construct and operate a cotton compress in the city of Shawnee, county of Pottawatomie, Territory of Oklahoma, for the purpose of receiving, compressing, weighing, storing, buying, handling, selling and ginning cotton" (R., p. 243). Sec. 932 Ok. Stat., 1893 (Wilson's Stat., 943), provides, among other things, that, "Articles of incorporation must be prepared setting forth:

2d. The purpose for which it is formed."

Sec. 949 Ok. Stat., 1893 (Wilson's Stat., 961), provides, among other things, that, "Every corporation, as such, has power:

Fourth: To purchase, hold, transfer and convey such real and personal property as the legitimate purposes of the corporation may require," etc., and also further provides that, "In addition to the above enumerated powers, and to those expressly given in any other statutes under which it is incorporated, no corporation shall possess or exercise any corporate powers, except such as are necessary to the exercise of the powers enumerated and given."

It is perfectly clear that the purposes enumerated in its articles of incorporation do not confer upon said Shawnee Compress Co. the power to lease its entire property, business, good will, etc., for a period of years, and, if it pos-

sesses such power, same must be derived from the provisions quoted from the section of our statute last cited, and it is equally clear that no such power is attempted to be conferred by said provisions.

The leading case in this country upon the question under consideration is that of Thomas *vs.* West Jersey R. R. Co., 101 U. S., 71; 25 L. Ed., 950, where, under statutory provisions equally as broad as, if not broader than, those just quoted, it was held that said railroad company had not the power to lease its road, rolling stock and other property to certain individuals for a period of years. In the opinion handed down by the United States Supreme Court in said case, per Mr. Justice Miller, on the question of the powers of a corporation to make such a lease, in the absence of any provision of the charter specifically authorizing the same, it is said that:

> "It is next insisted, in the language of counsel, that though this may be so, 'A corporate body may (as at common law) do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized by the charter, a shareholder may enjoin its execution; and the State may, by proper process, forfeit the charter.'
>
> "We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it

> remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

Then, after citing numerous English cases on the question under consideration, the court further says:

> "It would be a waste of time to attempt to examine the American cases on the subject, which are more or less conflicting, but we think we are warranted in saying that this latest decision of the House of Lords represents the decided preponderance of authority, both in this country and in England, and is based upon sound principle."

While it is true that said court bases its opinion in said cause upon another settled rule of law, it is apparent that the rule announced as applicable to corporations in general was in no way modified but, if anything, rather strengthened by the subsequent portion of said opinion, declaring and applying said other rule, as will be seen from the language used, which is, in part, as follows:

> "There is another principle of equal importance and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad was without the power to make such a contract.
>
> "That principle is, that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation

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from performing those functions, which undertakes without the consent of the State to transfer to others the rights and powers conferred by the charter, and to relieve the grantee of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy."

The rule announced in the case just cited has been repeatedly followed in subsequent cases decided by the Supreme Court of the United States.

Oregon Ry. & Nav. Co. *vs.* Oregonian Ry. Co., 130 U. S., 1; 32 L. Ed., 837.

Central Transportation Co. *vs.* Pullman Palace Car Co., 139 U. S., 24; 35 L. Ed., 55.

In both of these cases the principles announced upon both propositions discussed in the case of Thomas *vs.* West Jersey R. R. Co., *supra*, are specifically approved.

In Central Transportation Co. *vs.* Pullman Palace Car Company, Mr. Justice Gray, speaking for the court, after reviewing the two previous cases hereinbefore cited, and many others, says:

"The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws as are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: The obligation of every one contracting with a corporation, to take notice of the

legal limits of its powers; the interest of the stockholders not to be subjected to risks, which they have never undertaken; and above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law."

The case of Thomas *vs.* West Jersey Ry. Co., *supra*, is also cited and approved by many inferior Federal courts as well as by many of the State Supreme Courts.

Cass *vs.* Manchester Iron & Steel Co., 9 Fed., 640.

Cumberland Tel. & Tel. Co., *vs.* City of Evansville, 127 Fed., 187.

Davis *vs.* Old Colony R. R., 131 Mass., 258 (270–1).

See also, Small *vs.* Minneapolis Electro Matrix Co., 45 Minn., 264, 47 N. W., 797, and cases therein cited.

In discussing the question under consideration in the case last cited, the Supreme Court of Minnesota uses, in part, the following forceful language:

"We need not inquire how far, or under what circumstances, considerations of public policy and of the general interests of the State may affect the right of a corporation to discontinue the business for which it was created, and to surrender to another corporation its property and the conduct of such business. We do decide that such a surrender of the property, and, so far as possible, of the functions, of a corporation, in order that, while it is to still continue in existence, its business may be carried on by another corporation, to which such transfer is made, would violate the rights of a non-assenting stockholder arising from the contract, implied if not

expressed, in the creation of such an organization; and he would be entitled to have such acts restrained by injunction. * * *

"In the absence of express provision to the contrary, it is to be considered as the law concerning business corporations that their affairs are to be managed in the interest of their stockholders, and by directors or agents appointed by them. This is to be taken to be implied in the contract unless in some manner a different intention is expressed. It is not to be inferred from the pleadings in this case, even if such a thing be possible, that the original purposes of this corporation may have included the project of surrendering its business to some other corporation, to be carried on for a period of years by the latter, under the direction and control of its officers and stockholder, the stockholders of the company thus transferring its busines having no voice in the selection of such officers nor in the management of the business."

It will also be observed that, in Cass *vs.* Manchester Iron & Steel Co., Small *vs.* Minneapolis Electro Matrix Co., and Davis *vs.* Old Colony Rd., *supra*, the corporations, the scope of whose powers was under consideration, were not *quasi* public ones, but strictly private.

In Smith *vs.* Cornelius, 41 W. Va., 59, 23 S. E., 599, it is said:

> "Even a private corporation, unless authorized by charter to do so, cannot lease or dispose of its franchise or its property needful in the performance of its obligations to the State, without legislative consent; and I should think that for a stronger reason a public corporation cannot."

Counsel for appellants quote a short excerpt from the opinion of the United States Supreme Court, delivered by Mr. Justice Gray, in the case of Central Transportation Co. *vs.* Pullman Palace Car Co., 139 U. S., 24, which, as will be observed from an examination of said case, was largely *obiter dictum*, and claim that this supports their contention to the effect that a private corporation may lease or make any other disposition of its property necessary for the performance of the purposes for which it was created to the same extent as a partnership or an individual when the exigencies of its business require; but we submit that said case, when considered as a whole, in no wise modifies but, on the contrary, specifically approves both the propositions announced by said court, per Mr. Justice Miller, in Thomas *vs.* Railroad Co., 101 U. S., 71. This appears not only from the syllabus of said former case, each paragraph of which is made applicable to corporations in general, but from the further fact that both of said propositions so clearly stated and decided in the Thomas case are quoted in full and with approval. It also appears from the fact that, while the case of Treadwell *vs.* Salisbury Mfg. Co., 7 Gray, 393, is cited in support of the excerpt quoted by said counsel, no reference whatever is made to the later Massachusetts case of Davis *vs.* Old Colony Railroad, 131 Mass., 258, the opinion in which was delivered by the same judge while holding the position of chief justice of the supreme court of said State, and wherein, after quoting a portion of the language used by the court in deciding the second proposition determined in the

Thomas case, he says: "But that the decision was not intended to be put exclusively on this ground is manifest from the terms in which it was introduced, as well as from those in which the general doctrine had been already laid down, and from the concluding sentence of the opinion," and, after stating that the guaranty contract which had been entered into by the Old Colony Railroad Co. and the Smith-American Organ Co. was beyond the powers of said Railroad Co., which had been created "by public statutes of the commonwealth for the purpose of constructing and maintaining a railroad and carrying passengers and freight thereon," further adds that "The same reasons are no less applicable to manufacturing and trading corporations, established under general laws, and the purposes of which are required by those laws to be stated in their articles of association."

The following forceful reasoning on the question under consideration, is also found in said opinion, to wit:

> "A corporation has power to do such business only as it is authorized by its act of incorporation to do, and no other. It is not held out by the government, nor by the stockholders, as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of any ordinary partnership, but with such only as its charter confers. If it exceeds its chartered powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If

it makes a contract manifestly beyond the powers conferred by its charter, and therefore unlawful, a court of chancery, on the application of a stockholder, will restrain the corporation from carrying out the contract; and a court of common law will sustain no action on the contract against the corporation.

"Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity, especially where, as in this commonwealth, all acts of incorporation are deemed public acts, and every corporation organized under general laws is required to file in the office of the Secretary of the Commonwealth a certificate showing the purpose for which the corporation is constituted."

It should also be borne in mind that the rights of minority stockholders were not involved in any of the foregoing cases, except Treadwell *vs.* Salisbury Mfg. Co., but the question decided in each case was as to whether or not a contract, partially or wholely executed on one side, was absolutely void so as to be non-enforcible against the adverse party or parties, and in the Thomas case it appears to have been admitted by the counsel representing the plaintiff that "where the act is unauthorized by the charter the shareholder may enjoin its execution."

Furthermore, we think the case of Treadwell *vs.* Salisbury Mfg. Co., *supra*, so cited in support of the said excerpt quoted from the opinion in Central Transportation Co. *vs.* Pullman Pal. Car Co., is clearly distinguishable from the one at bar, as the question there involved was upon the sale of the entire property of the corporation

for the purpose of winding up its business and paying its debts, and the conclusion of the court is based principally upon the facts stated in said opinion, as follows:

> "Upon the facts found in the case before us, we see no reason to doubt that the vote of the majority of the stockholders for the sale of the corporate property, and the closing of the business of the corporation was justified by the condition of their affairs. Without available capital, and without the means of procuring it, the further prosecution of their business would be unprofitable, if not impracticable. Under those circumstances it was in furtherance of the purposes of the corporation to pay their debts, close their affairs and settle with their stockholders on terms most advantageous to them.'

We have never doubted that, in the absence of any statute upon the question, the majority of the stockholders of a corporation, under the circumstances stated in the foregoing quotation, would have the power to dispose of all the corporate property for the purpose of paying its debts, winding up its affairs and dissolving its corporate existence. But in this Territory a two-thirds vote of all the stockholders, followed by an application to the district court, is required to effect such a dissolution (Okl. Stat., Sec. 968, Sub. Div. 3).

Most of the other cases cited by said counsel in support of their contention upon the proposition now under consideration are also clearly distinguishable from the one at bar.

In Price *vs.* Holcombe (Ia.) 56 N. W., 407, there is no

holding to the effect claimed by counsel, that the lease contract referred to would or would not, if definitely made, have been sanctioned by the court over the objection of one or more minority stockholders, and the question involved in the case, like that of Treadwell *vs.* Salisbury Mfg. Co., *supra*, was one of sale for the purpose of winding up the business of the corporation.

In our opinion the case of Traer *vs.* Lucas Pros. Co., 124 Ia., 107, 99 N. W., 290, if it does not (in fact) somewhat qualify the rule announced in Price *vs.* Holcombe, *supra*, clearly holds that it should, in no wise, be extended beyond the peculiar features appearing therein.

It will also be observed that the court, in the case of Traer *vs.* Lucas Pros. Co., *supra*, bases its decision upon the fact that the charter of said corporation gave it power to sell all of its property, and also authorized it to deal in the stock of other corporations," and consequently that "it had the right to sell all of its property for stock in another corporation."

In the case of Freeman *vs.* Seaview Hotel Co., 57 N. J. E. 67, 40 Atl., 218, it is decided that: "A hotel company's charter authorized it to purchase ground and maintain an hotel at or near Atlantic City, which it did. Its business became unprofitable at its location, and it sold the property and purchased at another place in the city. Held, that the company could make the purchase, there being nothing in its charter restricting it." But it needs no argument to show that the foregoing holding is based upon quite a different state of facts from that presented in the case at bar.

In State *vs.* Western, Etc., Co., 40 Kan., 96, 19 Pac., 349, it is specifically stated that "There is no stockholder or creditor intervening or objecting, therefore we are not called upon to consider the rights of such parties." And in Morisette *vs.* Howard (Kan.), 63 Pac., 756, it is said that "It appears to have been done in good faith, with the consent of the stockholders; and we see no reason why a mere trading corporation, like this one, cannot close up its business in the manner pursued in this instance."

The case of Miners' Ditch Co. *vs.* Zellerbach, 37 Cal., 543, goes off principally on the question of estoppel, the court holding that a corporation would not be heard to allege the invalidity of the sale of its entire property after all of its stockholders having received the full compensation agreed upon and having, without complaint, stood by and permitted the property to pass into the hands of innocent third parties, the last clause of the syllabus of said case reading as follows: "Conceding it to be unlawful for a corporation to make a sale of all its property to another corporation, and receive in payment therefor the stock of the grantee to be distributed among its own stockholders, yet, if such sale is made, and the contract fully executed, the corporation itself can not recover back the property sold, or set aside the contract on account of its illegality;" and in the body of the opinion in said case the court, commenting upon and quoting from an English case, uses the following language, to wit: "So the same justice recognizes the difference between cases where stockholders are suing in

equity to restrain the misappropriation of the corporate funds, and a suit on a contract against a corporation by a stranger. In these suits in equity the members of the corporation, in their individual capacity, are considered to have rights *inter se* analogous to those of partners *inter se*, and the act incorporating the the company is considered to be analogous to a partnership deed. * * * The mere circumstance of a covenant by directors in the name of the company, being ultra vires as between them and the shareholders, does not necessarily disentitle the covenantee to sue upon it." Further on in the opinion, which is a very elaborate and well considered one, the California supreme court says:

> "From the cases cited it very clearly appears that the question as between stockholders and the corporation is a very different one from that which arises between the corporation itself and strangers dealing with it. * * * The enterprise of the Miners' Ditch Co. may have proved unprofitable, and rendered it necessary to dispose of its assets and wind up the concern as the only means of avoiding insolvency. * * *
>
> "Although the object for which it was formed was to construct a ditch and convey water for sale to miners, and for mechanical purposes, there was no obligation resting on the corporation to pursue this object after it became evident that the enterprise would be unprofitable and result in insolvency or loss. When such a result appears to be unavoidable, obviously the only mode by which the interests of the parties and of the public could be subserved would be to dispose of its assets in the most advan-

tageous way, and pay off its debts, with a view to winding up the affairs of the corporation with the least possible loss."

The case of Tanner *vs.* Lindell Ry. Co., 180 Mo., 1, is also determined largely upon the question of estoppel and upon the provisions of certain special acts of the legislature authorizing the consolidation and transfer of property complained of, the first clause of the syllabus reading as follows: "An injunction will not be granted, at the suit of minority stockholders of a street railway company to restrain the company from selling its assets to, and consolidating with, another company, over such stockholders' protest, where such minority stockholders by their own laches have made it impossible to grant the injunction without inflicting serious injury on the parties to be enjoined." It will also be observed that the corporation making the conveyance sustained in said case was a *quasi* public one, and it has not been contended even by counsel for appellants in the case at bar that such a corporation can legally make such conveyance over the objection of a minority stockholder without specific legislative authority so to do.

The opinion in the case of Berry *vs.* Broach, 65 Miss., 450, 4 So., 117, as well as the statement of facts, is very brief, but shows that the sale of the property in said case was for the purpose of winding up the affairs of the corporation; and the decision seems to be based principally upon the fact that the plaintiff, having participated in the meeting of stockholders at which the sale was authorized and voted for same, was thereafter estopped to allege its invalidity.

The case of Doyle *vs.* Leitelt, 97 Mich., 278, 56 N. W., 553, is in no respect in point upon the question under consideration.

The case of Byrne *vs.* Schuyler Electric Mfg. Co., 65 Conn., 336, 31 Atl., 833, we regard as a very strong one in favor of the contention of appellees in the case at bar. It is very correctly declared in the opinion of the court, per Chief Justice Andrews, in said case, that: "The charter of a corporation is its enabling act. A corporation is empowered to do those things only for which it is created, and to do them in the manner specified in the charter. This is especially the rule in the case of private trading or manufacturing corporations." It is also therein held that: The fact that a stockholder is not injured by an *ultra vires* contract of a corporation, to which all the other stockholders have consented, does not prevent his maintaining an action to enjoin its performance."

There is no question of the sale or lease of property involved in the case of Levering *vs.* Bimel, 146 Ind., 545, 45 N. E., 775, and we presume the reason the case is cited by counsel for appellants is because of the declaration therein contained that: "A private corporation, unless restrained by statute, may legitimately deal with its property in a manner similarly as an individual deals with his"; but if this language is intended to apply generally to all transactions, it is so manifestly contrary to the overwhelming weight of authority upon the question as to render further comment thereon unnecessary.

The case of Skinner *vs.* Smith, 134 N. Y., 240, 31 N.

E., 911, is similar to the one last above cited in that no question of the sale or lease of property is involved and is evidently cited because of the following declaration therein contained, to wit: "The right of a manufacturing company to discontinue operations when they have become unprofitable, for the purpose of protecting shareholders from further loss, does not admit, we think, of doubt." We have no disposition to dispute this proposition and, as before seen, our statute has made specific provision for this very thing but, as before stated, this is quite a different matter from leasing the entire physical property of a corporation, together with its good will, as a matter of speculation and not for the purpose of paying its debts and winding up its affairs.

The case of Hancock *vs.* Holbrook, 9 Fed., 353, is very clearly distinguishable from the one at the bar, on the grounds just stated, as is also that of Phillips *vs.* Providence Steam Engine Co. (R. I.), 43 Atl., 598, and Rothwell *vs.* Robinson, 44 Minn., 538, 47 N. W., 255. The rule on this proposition, stated in Holmes & Griggs Mfg. Co. *vs.* Holmes & W. Metal Co. (N. Y.), 27 N. E., 831, is probably the correct one, and is as follows: "The plaintiff had the right, with the consent of its stockholders, to sell its plant and retire from business; and it appears from the evidence in this case that the consent of all the stockholders was given to the sale that was made."

In the case of Sewell *vs.* East Cape May Beach Co., 50 N. J. Eq., 717, 25 Atl., 929, the decision of the court, holding the sale of the entire property owned by the defendant valid, is largely based upon the finding that

"The purchase and sale of real estate is expressly contemplated in the corporation of this company. It does not buy and hold and improve real estate simply as an incident to its corporate existence, but it was really created for the purpose, so to speak, of speculating in the sale of lands. This being so, it is necessarily within the power of the directors, to whose management the affairs of the company are entrusted by law, to say on what terms and credits the property of the company shall be disposed of."

We regard the cases of Plant *vs.* Macon Oil & Ice Co., 103 Ga., 66, 30 S. E., 567, and Bartholomew *vs.* Derby, 69 Conn., 521, 38 Atl., 45, as in point supporting the contention of counsel for appellants where the business affairs of a corporation are in such condition as to render its further operation, by and through it own directors, practically impossible without great loss to its stockholders. But we insist that the holding of these two cases is contrary to the decided weight of authority upon the proposition, and further that even if this were not so, no such emergency as that required to come within the rule announced in said cases is disclosed by the evidence in this case at bar, but on the contrary the undisputed evidence in this case shows that the Shawnee Compress Co. had never been operated at a loss but that its net earnings for each of the past three compressing seasons were several thousand dollars.

Mr. J. M. Aydelotte, the president of said company for several years prior to the special meeting of stockholders held on April 24, 1905, on his direct examination by

counsel for defendants, testifies, upon the question of the earnings of said plant, in part as follows:

"Q. During the four years that you were connected with it, did the Compress Company earn anything?

"A. Yes, it earned a little money each year.

"Q. How much?

"A. The year 1903, I think it earned about $5,000.00.

"Q. Net or gross?

"A. Net. The season of 1903 and '4.

"Q. What did it earn the preceding year?

"A. And the season of 1902 and '3 I think, I think it was $4,300.00" (R., 108, 109), and on the question of the financial condition of said company, he further testifies in part, as follows:

"Q. What was its condition with reference to being able to pay its indebtedness?

"A. Well, they had no funds in hand to pay the notes that they owed the Webb Compress Company. * * *

"Q. At the time that you resigned as president, you also ceased to be a stockholder, did you?

"A. Yes, sir, a few days after that.

"Q. Now, about that time, what was the condition of the Compress Company, with reference to being pressed by its creditors or not?

"A. It was pressed at one time by the Webb Compress Company for the $2,250.00 note, and they took the matter up with them and they extended the time. * * *

"Q. Well, the Shawnee National Bank, were they insisting or not, on their money?

"A. Yes, sir.

"Q. What had they been doing with reference to trying to get their money?

"A. They were urging the stockholders to make some disposition and pay the note as soon as possible; they never did crowd them or threaten to bring suit or anything. We urged them to make arrangements to pay it as soon as possible; that we needed the money and didn't care to carry it longer." (R., 109.)

Mr. Aydelotte further testifies that the indebtedness of the company was about $18,000.00 (R., 110), and that he valued the plant to B. L. Anderson at $35,000.00, and also that the indebtedness of said plant to the Webb Compress Co., as well as its aggregate indebtedness, had been reduced (R., 114); and Mr. Beatty (the principal witness for defendants), testifies that the net earnings of the plant for the season of 1904–'5 was more than $7,386.-05 (R., 104); and that same was worth, in his opinion, $35,000.00 (R., 114).

In addition to the foregoing undisputed testimony, both F. E. and B. L. Anderson testified that, in their opinion, there would have been no material difficulty in procuring a new loan to take up the second mortgage indebtedness and in procuring any reasonable further extension of the time of payment of the first mortgage indebtedness, and that they could and would have procured the money necessary to take up both liabilities if authorized by the stockholders and directors of said company so to do and in order to prevent any foreclosure proceedings (R., 154, 155, 160, 161, 166).

We submit that, in our opinion, no single decision or authority can be found which will justify the leasing of the property of the Shawnee Compress Company under the state of facts shown by the foregoing testimony, most of which, as before seen, is undisputed, even conceding (for the sake of the argument) the rule contended for by counsel which is stated on page 48 of their brief, as follows:

> "It is true that in many instances, and perhaps all, the courts require some exigency to exist which imperils the business or threatens the property of the private corporation before permission is granted to lease its entire plant."

The evidence discloses that at the time the Shawnee Compress Company was incorporated the value placed upon its assets was $11,000 and the capital stock was placed at that amount, 110 shares at $100 per share. Later the capital stock was increased to $16,000, but it is not shown anywhere that any part of the increase was paid to the corporation by the holders thereof. Fortunately there is no doubt about what occurred when the capital stock was increased from $16,000 to $50,000. On the 10th day of June, 1901, the certificate signed by J. M. Aydelotte, A. M. Graves, A. E. Nelson, C. J. Benson, H. T. Douglas, D. W. Cheatham and John M. Butcher, among other things provided that "It being understood and agreed that the increase of Thirty-four Thousand (34,000) Dollars is to be divided or apportioned pro rata among the present stockholders, according to the amount of stock now held by each * * * the following stock-

holders were present, represented as follows: J. M. Aydelotte, 30 shares, H. T. Douglas, 5 shares, C. J. Benson, 35 shares, A. E. Nelson, 28 shares, A. M. Graves, 19 shares, O. W. Cheatham, 19 shares, Jno. W. Butcher, 19 shares.

It therefore must appear that at least $34,000 of the subscribed stock had not then and never was paid up. This is important and interesting in view of the contention of counsel for appellants as to the existence of exigency in this case. Section 975 of Wilson's Oklahoma Statutes provides that—

> "Each stockholder of a corporation is individually and personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him."

Section 986 of said statutes relating to assessments of stock provides:

> "First, If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be made for the full amount unpaid upon the capital stock; or if a less amount is sufficient then it may be for such a percentage as will raise that amount."

Therefore at least the sum of $34,000, if needed, was available to pay obligations of the corporation, but no such sum was necessary. No steps were taken to comply with the plain provisions of the statute relating thereto. This in connection with the fact that the net

income of the Shawnee compress for the preceding year was $7,386.05, and that within that year, according to the testimony of appellant Beatty, improvements costing nearly $5,000 had been added which would increase the efficiency and capacity of the plant about one-half With a net income of about one and one-half times the amount of the rental agreed upon, and with a capacity twice as great for future years, no exigency could or did exist such as would warrant the action taken, even if the cases relied upon by counsel are applicable to this case. The exigency which caused the execution of the pretended lease is one of an entirely different sort, and doubtless had a sinister if not a corrupt motive back of it.

In this connection, we call special attention to the case of Parsons *vs.* Tacoma Smelting & Refining Co. (Wash.), 65 Pac., 765, the facts in which are more similar to those presented in the case at bar than any other which we have been able to find, and wherein the Supreme Court of the State of Washington, upon said facts and upon statutory provisions also very similar to those in this Territory, held, in effect, that such a contract of lease is *ultra vires*, and that, in any event, no such emergency existed as to authorize its execution, and thereupon reversed the judgment of the trial court and declared the lease contract void. In that case, as in this, no special findings of fact were made by the trial court, which, after hearing the testimony, entered a decree dismissing the action.

The testimony therein showed that the stock had been

issued to the subscribers upon payment of fifty per cent. of its par value, which is evidently a much greater per cent. than was ever paid into the treasury of the Shawnee Compress Co. by the holders of its capital stock. At any rate, there is no testimony in the record in this case showing the payment of any amount by the subscribers to the capital stock, and it is quite certain that nothing was paid for the increase in the amount of said stock from $11,000 to $50,000, if in fact any considerable portion of the original $11,000 was paid up. Otherwise, even if as much as fifty cents on the dollar of the increase in the capital stock above the original $11,000 had been paid in, there would have been ample to discharge the entire indebtedness of said company.

It is also shown in the case last cited that "The resolution of the meeting of the stockholders of the Tacoma Smelting & Refining Co. recites as reasons for the execution of the lease that the corporation was without sufficient capital to conduct its business at a profit, or in such a manner as to pay its operating and incidental expenses without drawing upon its capital, and that it was compelled to liquidate its affairs unless capital could be raised; that it had made diligent efforts to raise such capital without success until recently, when, through the manager, Mr. Rust, it had been able to arrange so that the business of the company could be continued and the plant and property of the company preserved and maintained in good order and condition, upon the terms mentioned in the lease."

What a similar ring this has to the resolutions pre-

pared by the leading counsel for appellants in the case at bar and presented to and adopted by Messrs. Beatty and Stubbs, assuming to act as a majority of the board of directors of said Shawnee Compress Co. at the meeting held on May 1, 1905, being the last one prior to the commencement of this action (R., 23–4). It was also shown by the testimony in that case that "about 1892–93 it sustained considerable loss because of falling values in silver and lead. What the aggregate losses were is not stated with precision, but the company had borrowed about $50,000, for which it was liable, and it had no funds on hand."

In discussing the scope of the powers of the corporation in that case, the Supreme Court of Washington say, in part:

> "The objects of the incorporation of the Tacoma Smelting & Refining Co. are stated in its articles to be the building, acquiring, owning and constructing and operating of works and buildings for the purpose of milling, reducing, smelting and refining gold and silver ores, purchasing and handling of such ores, advancing money thereon, and acquiring, purchasing, owning and operating of such appliances and adjuncts as may be necessary or convenient for the prosecution of the business; the purchasing, owning and acquiring of mines and all other lands that may be necessary or convenient in operating said business; and generally to do all other acts which, in the judgment of the trustees, may be proper or essential to the successful carrying on of the purposes and objects of the corporation. It is apparent that no express power to lease all the property

of the corporation is contained in the article. The articles of incorporation, as observed, are a contract. Each individual stockholder assumed the liability of the payment of his subscription to the capital stock in money or money's worth, and the corporation engages to carry on the business for which it is organized. * * * The stockholders have equal rights to participate in the profits of the business according to the value of the stock owned by each, and each stockholder is entitled to the protection of his charter rights. He may insist that the business be conducted according to the articles; and, while the wishes of the majority of the stockholders are potent in the administration of all the business of the corporation, and, where exercised without fraud or oppression are controlling upon the minority, yet the action of the majority can not prevail where it impairs the contract right of a stockholder. The reasons urged for the necessity of the lease in question was that the Tacoma Smelting & Refining Co. was unable to procure capital to conduct its business efficiently; that it had liabilities which were pressing and had no available funds to make payments.

"It may be well to suggest an inquiry into the condition of the corporation at the time the proposal to lease the property was made. It had a plant of considerable value. It apparently exceeded in value the liabilities, and, while the amount is not definitely shown, it appears that a large portion of the subscriptions to the capital stock had not been paid. Mr. Rust testifies that some of the subscribers to the capital stock had been requested to advance capital to con luct the business, but that no such advancements had been made. It is nowhere intimated

that the board of trustees had attempted to exercise its appropriate powers to collect the unpaid subscriptions to the capital stock. * * * It cannot be concluded from the record before us whether other action by the board of trustees might not keep the corporation a going concern, and enable it to perform the objects of its organization."

In concluding the argument upon this question, said court, per Chief Justice Reavis, uses the following language:

"A distinction may be observed between a sale of all the property and a lease of all the property. In that of a sale no further liability rests upon the stockholder. The corporation is, in fact, discontintinued. In that of a lease the business is discontinued and the profits derived by the lessee, but the stockholders' obligations may continue. Under our statutes the corporate existence is limited in time. This was not usual in the older cases. And, further, Section 4275, 1 Ballinger's Ann. Codes & St., contains the complete procedure for the dissolution of the corporation at the will of two-thirds of the the stockholders. These statutes apparently contemplate the conduct of the business for which the corporation is organized through its own appointed agencies, or, at the choice of two-thirds of the stockholders, a dissolution. It is true, an insolvent corporation may make an assignment for the benefit of its creditors against the will of a non-consenting stockholder, and probably any appropriate proceedings in equity might be taken to relieve a failing corporation by such disposition of its property as should be equitable which did not vio-

late any contractual relations of the stockholders." And further on in the opinion of said case, while discussing another question involved therein, that court very correctly says: "It has always been true that corporations have only such powers as are granted to them by the State, and, when a corporate act is questioned, the affirmative is upon the corporation to show its authority. It is not entirely correct to draw a right line between corporations which are *quasi* public and another class designated as private. The State will more readily interfere, perhaps, when the duty of a corporation is public than when it is merely a trading or manufacturing, or commercial company; but we apprehend that the rights of stockholders are equally protected in both."

It will also be observed, from an examination of the opinion just quoted, that the court therein cites and discusses at some length all of the cases cited by counsel for appellants, and some others, bearing upon the question of the power of a private corporation to lease its property necessary to the performance of the purposes for which it was created, and distinguishes most of them. It will also be observed that the provisions of our statute relating specifically to corporations organized "for mining, manufacturing, and other industrial pursuits," which certainly includes those organized for the compression of cotton, are practically identical with those of the State of Washington cited in said opinion, as controlling upon the question under consideration. (See Secs. 1071–4, page 266, Okl. Stat., 1893.) Section 1072 requires, among other things, that: "The purposes for which every such corporation shall be formed must be distinctly and defi-

nitely specified in the articles of incorporation;" and Section 1073 requires that: "Regular books of accounts of all the business of such corporations must be kept, which, with the vouchers, shall be at all reasonable times open for the inspection of any of the stockholders; and as often as once in each year a statement of such accounts shall be made, by order of the directors, and laid before the stockholders." This certainly contemplates that the business of every such corporation shall be conducted through its own managing officers and not farmed out to some other corporation or individual. And Section 1074 provides, among other things, that: "The stockholders of any corporation formed for the purposes mentioned in this article shall be jointly and severally liable, in their individual capacities, for all debts due to mechanics, workmen and laborers employed by such corporation;" hence, as suggested by the court in Parsons *vs.* Tacoma Smelting & Refining Co., *supra*, the obligations and liabilities of the stockholders may be continued under a lease contract notwithstanding they would have no voice in the management of the affairs of the corporation.

Attention is desired to the language used in the case of Renfrow *vs.* Grimes, 6 Okla., 608, 613–14, to-wit:

"We think that plaintiffs, in their official capacity as members of this board, can no more enter into a contract (which will be valid and binding) beyond the scope of the authority conferred upon them by statute than can a public or private corporation; and no rule of law is better settled than that such corporation can only execute a valid lease or other contract when authorized so

to do by statute," citing cases, and, among others, that of Thomas *vs.* West Jersey R. R. Co., 101 U. S., 71, and then quoting therefrom the following excerpt, to-wit:

> "We take the general doctrine to be in this country, though there may be exceptional cases and some authorities contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer, thus, we think fully approving the doctrine laid down in the Thomas case upon the question of the limitation of powers of corporations in general, regardless of whether they are strictly private or such as are designated *quasi* public."

In concluding upon this branch of the case, we desire to further submit that, under the undisputed evidence, it cannot be said that the lease contract with the Gulf Compress Co. would even prove as remunerative to the local company as the operation of its plant through its own regularly selected officers; that the indebtedness of said plant was less than it had ever been since the purchase of the new press from the Webb Compress Co. and the giving of notes in payment therefor in the sum of $22,000.00, and that there is no shadow of doubt but what any reasonable additional extension of the time of payment of the balance remaining due on this obligation could have easily, if it had not already, been secured by the payee. See letter of Robert D. Webb, of March 17, 1905, to Mr. Beatty, which reads as follows: "Yours 13th, and will let the note extend over, and trust that your expectations in regard to dividends earned will be realized" (R., 183). Consequently, the only emergency

requiring the hasty action taken in the attempted consummation of said lease contract, on the part of Mr. Beatty and his associates, was in the personal affairs of Messrs. Beatty and Stubbs. Beatty testified that in April, 1905, when he went to Memphis to see Hanson it was figured by them that the Shawnee Compress Co. had made a net gain of about $7,000 for the previous season (R., 88). Beatty testified there was a net gain of $7,386.05 above insurance and taxes paid for the year ending December 31, 1904 (R., 104 and 105). It therefore follows that said pretended lease was *ultra vires* and void at the instance of the appellees.

III.

The said lease contract is void at the suit of the appellees, being non-assenting stockholders, for the reason that the same was not executed, by the parties assuming to represent the Shawnee Compress Company, as its managing officers for the best interests of said company, but to advance their own private interests.

The testimony of W. H. Beatty, who assumed to represent the Shawnee Compress Co. in practically all the negotiations leading up to the submission of the lease proposition by Mr. C. C. Hanson, on behalf of the Gulf Compress Co., and who was the moving spirit among the stockholders of the said former company in causing the pretended execution of said lease contract, shows very clearly, we think, that his principal purpose in securing the execution of same was to procure a private loan on the stock owned by himself and T. F. Stubbs, and to reduce their indebtedness to the Shawnee National Bank.

Concerning the motive which prompted the actions in this regard, Mr. Beatty testified, in part, as follows:

> "Q. Now in this state of affairs, what did you then do relative to the Shawnee Compress Company; did you go to Memphis to see Mr. Hanson some time in April?
>
> "A. I went to Memphis some time in April for the double purpose of preventing the press property from being sold as a whole and from its consequent bad effects on my holdings as a stockholder, some time in the early part of April; I don't remember the date" (R., 90).

This testimony follows that given by said witness on his direct examination as to the financial condition of said Shawnee Compress Co., and, more particularly, showing that the plant had been advertised for sale for the payment of the last half of the taxes for 1904, then delinquent, but when he is compelled, on cross-examination, to state the facts about this matter, it is shown that the cause of these taxes becoming delinquent was the mistake made by himself, as secretary of said company, in showing, on the books of the company, that said taxes had already been paid, and that none of the appellees had any knowledge of the fact that said taxes had not been paid (R., p. 99); and the undisputed evidence further shows that the advertisement of said plant for sale was not in April, as first stated by Mr. Beatty, but in the early part of September, 1905.

Further testifying as to his own financial situation, and the motives actuating his efforts to procure the execution of said lease, he says:

"Q. Mr. Beatty, you say that you told Mr. B. L. Anderson that you and Mr. Stubbs had bought enough stock to make you majority stockholders?

"A. I did.

"Q. Then how much stock did you and Mr. Stubbs own prior to the purchase you refer to?

"A. At the time of the meeting; at that time we held 260 shares.

"Q. How much did you own prior to the time you made the purchase?

"A. 133 shares.

"Q. Now, you did not pay for it, did you?

"A. I did.

"Q. You had it all hypothecated, did you not?

"A. Had it all hypothecated, yes, sir.

"Q. And you had money enough to go on and buy this other stock?

"A. Yes, I had to arrange that at the Shawnee National Bank.

"Q. The Shawnee National Bank had an option on that stock for ten days, did they not?

"A. I don't remember the time, but I bought it from Mr. Douglass on about the 10th or 11th day of April. * * *

"Q. Did you pay Mr. Nelson anything?

"A. No, sir; I did not deal with Mr. Nelson.

"Q. How much did you pay Mr. Douglas?

"A. I paid him $25 a share; I don't remember how much, I remember too——

"Q. Did you pay him cash for it?

"A. Yes, sir.

"Q. Did you pay him by check or how?

"A. I paid Mr. Douglas by check, on about the 10th or 11th, the day that the date shows on that stub.

"Q. Did you have money in the bank to pay for it or borrow the money?

"A. I borrowed the money (R., 96–7). * * *

"Q. Your purpose in buying this stock, Mr. Beatty—one of the purposes was to help consummate the negotiations for this lease, was it?

"A. It was so as to protect my minority interest.

"Q. Wasn't it also to carry the lease of the property?

"A. If necessary to carry the lease of the property.

"Q. You had been over to see Mr. Hanson about making the lease?

"A. I was going to buy the stock—the five years' lease would show me its value—I hadn't made any trade.

"Q. Yes, but you knew what proposition he would make, didn't you?

"A. No, I didn't know what proposition he would make. His letter there is dated the 18th of April, and I bought that stock I think on the 11th of April, as will be shown by telegrams from the Western Union office.

"Q. Telegrams between whom?

"A. The parties in interest.

"Q. You and whom?

"A. The telegrams were between me and the party with whom I could make any arrangement. I notified Mr. Hanson on the 11th of April that I had bought the stock.

"Q. You had arranged with him to get the money while you were there?

"A. I had arranged with Mr. Benson c the Oklahoma National Bank to get it at 12 per cent. and Mr. Hanson had offered to let me have it at 8 per cent.

"Q. Who did you get it from?

"A. I got it from Mr. Douglas temporarily, and I got it from Mr. Hanson finally; he had said that he would lend it to me, or that he would provided the investigation of his auditor was satisfactory.

"Q. Was that when you went over to see Mr. Hanson, about what date?

"A. About the first week in April.

"Q. You had discussed the matter of making the lease with him?

"A. I had discussed the matter of getting him to make us a proposition.

"Q. And you had discussed the matter of his advancing you money to buy this stock with?

"A. Which had not been agreed to.

"Q. And you had been talking of your stock, the shares that you had and the shares that you were going to get, and his making you this loan?

"A. Yes, but it had not been agreed to.

"Q. And then you came back and made your definite arrangements for the money about the 11th of April by wiring Mr. Hanson?

"A. No, sir; my telegram simply stated that I had bought the stock. I had made that arrangement with Mr. Douglas.

"Q. Temporarily?

"A. Yes, sir.

"Q. And it was also understood between you and Mr. Hanson that, with this additional stock, if you got it, you could force that lease?

"A. That was the understanding (R., 97–8).

* * * * * * *

"Q. He (Hanson) wanted to investigate the financial condition of the company to determine whether he would make you a loan?

"A. Yes.

"Q. How long was the auditor in checking up to determine whether he would make you the private loan, and make this $6,000 loan?

"A. He checked it up the day he was there and made his statement.

"Q. You had a stockholders' meeting on the 24th and Mr. Hanson and his auditor were there the next day?

"A Either the next day or the next after that (R., 101).

* * * * * * *

"Q. How many letters did you write to Mr. Hanson or the Gulf Compress Co.?

"A. A very few; two or three.

* * * * * * *

"Q. How many wires did you send to Mr. Hanson in regard to the company's affairs and your own affairs?

"A. I sent him very few in regard to the company's affairs. My own affairs I don't remember.

"Q. Well, prior to the time that you say you bought these 133 shares of stock of Mr. Nelson, how much were you indebted to the Shawnee National Bank, for which you had stock pledged as collateral security?

"A. I think it was about 30 cents on the dollar.

"Q. You mean you pledged your previous stock at about 30 cents on the dollar?

"A. That is my recollection.

"Q. Then you got this from Nelson at 25 cents and borrowed all that money from the bank?

"A. Yes.

"Q. Now, wasn't that loan, that last loan, with the distinct understanding that the bank should carry it temporarily, and that Mr. Hanson would take it up?

"A. They had my word that I could make that arrangement.

"Q. How much did Mr. Hanson advance you?

"A. $7,500, which was less than I had borrowed from the bank to pay the Nelson stock; less than the amount that I borrowed from the bank, and that I got to pay for the Nelson stock.

"Q. How much more did you owe the bank that Mr. Hanson took up?

"A. I don't know; I don't remember the amount, except that I know that that did not clean up the entire amount.

"Q. You don't know, can't you approximate it?

"A. No, sir, because I had other collateral with them; I had some mules and a crop, a potato crop, and other collateral.

"Q. You pledged how many shares of stock to the Hanson Company?

"A. Three hundred and two (R., 104).

While Mr. Beatty would not specifically admit that it was understood with Mr. Hanson that the personal loan would not be made to himself and Mr. Stubbs unless the Gulf Compress Co. succeeded in procuring a lease from the said Shawnee Compress Co. (R., 104), it is quite apparent that this was the understanding and Mr. Hanson, when pressed for a definite statement as to whether he would otherwise have made said personal loan, testifies as follows:

"Q. Do you mean to say that you have made that contract with Mr. Beatty, and would have carried his stock without having a lease contract, just the same?

"A. I would not have specially cared for it, unless we were interested in a way so that we knew that the property was being managed, and how it was being managed; it was one inducement that I had in offering to make the loan.

"Q. The loan to Mr. Beatty personally?

"A. Yes, sir." (R., 70.)

It is evident this arrangement between Mr. Hanson and Mr. Beatty as to the personal loan of $7,500 made by Mr. Hanson to Beatty and Stubbs had been made prior to the special meeting of the stockholders held on April 24, 1905. Mr. Hanson testified: "I told Mr. Anderson that Mr. Beatty, of Beatty & Stubbs, had said to me that they had had a hard season, and that they wanted to realize some money on their stock, and I asked him for his idea regarding the value of that stock, *as they were negotiating with me for a loan.*" (R., 132.) There is no conflict of testimony on this point.

In view of this testimony we submit that it is clearly shown that both Messrs. Beatty and Stubbs had such a personal interest in the matter of securing the execution of the lease contract under consideration as to render the lease contract void, same having been authorized by their votes, as alleged members of the board of directors of the Shawnee Compress Co. (R., 15, 16).

"A director cannot with propriety vote in the board of directors upon a matter affecting his own private interest any more than a judge can sit in his own case; and any resolution passed at a meeting of the directors at which a director having a

personal interest in the matter voted will be voidable at the instance of the corporation or the shareholders, without regard to its fairness, provided the vote of such director was necessary to the result."

. . 10 Cyc., 790.

"The question presented for our consideration and decision is, can a director in an incorporated company become a contractor with the company, or can he have any personal and pecuniary interest in a contract between the company of which he is a director and third person? We think the law is well settled, both in England and in this country, that he cannot."

Port *vs.* Russell, 36 Ind., 60. Further on, in the opinion, the court quotes with approval the following language used by Lord Cransworth in deciding the case of the Aberdeen Railway Co. *vs.* Blakie, 1 Macq. Ap. Cas., 461, to wit:

"A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interest of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character toward his principal; and it is a rule of universal application, that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, any personal interest conflicting, *or which possibly may conflict*, with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be,

impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best for the *cestui que trust* which it was possible to obtain."

See also, Curtin *vs.* Salmon River Hydraulic Gold Mining, etc. Co., (Cal.), 62 Pac., 552.

Bassett *vs.* Fairchild (Cal.), 64 Pac., 1082.

Ward *vs.* Davidson (Mo.), 1 S. W., 846.

3 Clark & Marshall on Private Corporations, Sec. 760.

From the rule laid down by the foregoing authorities, which is undoubtedly correct, it is apparent that, if the vote of Messrs. Beatty and Stubbs, or either of them (either at the stockholders' or directors' meeting) in favor of said lease contract, might have been caused by a desire to procure from Mr. Hanson, or the Gulf Compress Co., a personal loan of $7,500, then said contract is voidable at the election of appellees and this regardless of any showing as to the fairness of said contract or its being for the best interest of the stockholders of the said Shawnee Compress Co., and, in this connection, we candidly submit that we believe it cannot be judicially declared that their said private interest in this matter could not possibly have influenced their votes.

Furthermore, the testimony shows the plant was being much more advantageously operated by the Shawnee Compress Company, and was making a much larger net income than is derivable under the said lease, as has been heretofore shown.

IV.

The judgment of the Supreme Court of Oklahoma should also be sustained upon the ground that the pretended proceedings attempted to be taken at the special stockholders' meeting of Shawnee Compress Company of April 24, 1905, especially those relating to the authorization of a certain committee to close a lease contract with the Gulf Compress Company, and to the purported amendment of the by-laws of said company reducing the number of directors thereof to three, and the pretended election of only three members of said board by resolution, are illegal and utterly void; and the pretended proceedings had at the subsequent special meetings of said pretended board of directors are illegal and void.

It is shown by the undisputed pleadings and evidence that on the 13th day of April, 1905, J. M. Aydelotte, as president of the Shawnee Compress Co, sent the following notice to the various stockholders thereof, to wit: "A special meeting of the stockholders of the Shawnee Compress Co. is hereby called to be held at the company's office in Shawnee, Monday, April 24, 1905, at 11:00 A. M." (R., 180).

That at said meeting of stockholders, without any previous notice to the appellees, the proposition of leasing the entire property, good will, etc., of the Shawnee Compress Co. to the Gulf Compress Co., was presented by Mr. Beatty, as secretary of said former company, and that, over the protest and against the votes of appellees a res-

olution was carried appointing a committee of three, composed of F. E. Anderson, C. J. Benson and W. H. Beatty, and instructing them to negotiate and close a lease contract with the Gulf Compress Co. for a period of five years, at the stipulated rental value of $6,000 per annum (R., 15). Now we insist that this proceeding is void and that the stockholders, if all had assented thereto, could not authorize said committee to make a lease contract disposing of the corporate property of said company.

Okla. Stat., 1893, Sec. 956, p. 233 (Wilson's Stat., Sec. 968).

Gashwiler *vs.* Willis, 33 Cal., 12.

It is also shown by the undisputed pleadings and evidence that, at said stockholders' meeting, certain resolutions were adopted purporting to amend the by-laws of said company so as to reduce the number of its board of directors to only three and, in effect, to declare the previous annual election of directors void and to oust all of the nine persons so elected at said previous annual meeting of the stockholders and to elect, as such board of directors, a board consisting of only three members, T. F. Stubbs, F. E. Anderson and W. H. Beatty, said pretended election being by a mere resolution and not by ballot (R., 15, 203).

We most earnestly insist that these pretended proceedings were utterly void, as being in direct conflict with several provisions of our statute and contrary to well established rules of law laid down by an almost (if not quite) unanimous line of decisions.

Section 932, Okl. Stat., 1893 (Wilson's Stat., 943), provides, among other things that, "Articles of incorporation must be prepared setting forth ; * * * Fifth : The number of its directors or trustees, and the names and residences of such of them who are to serve until the election of such officers and their qualifications."

Sec. 951 (W. S., 963) provides that a corporation may, by its by-laws, where no other provision is especially made, provide a number of matters regulating the time, place and manner of calling and conducting meetings, etc., which will be binding upon the corporation, but, of course, does not attempt to authorize the corporation to fix the number of its directors by by-laws, as that must be done by the articles of incorporation, as seen by the provisions of the previous section.

Sec. 952 (W. S., 964) provides, among other things, that " The by-laws may be repealed or amended, or new by-laws may be adopted at the annual meeting, or at any other meeting of the stockholders or members, called for that purpose by the directors, by a vote representing two-thirds of the subscribed capital stock or by two-thirds of the members."

Sec. 953 (W. S., 965) provides that, " The directors of a corporation must be elected annually by the stockholders or members and, if no provision is made in the by-laws for the time of election the election must be held on the first Tuesday in June. Notice of such election must be given, and the right to vote determined as provided in Section 675."

Sec. 954 (W. S., 966) provides that, " At the first meet-

ing at which by-laws are adopted, or at such subsequent meeting as may then be designated, directors must be elected to hold their offices for one year, and until their successors are elected and qualified."

Sec. 955 (W. S., 967) provides that, "All elections of directors must be by ballot, and the vote of stockholders representing the majority of the subscribed capital stock, or of a majority of the members, is necessary to a choice."

Sec. 960 (W. S., 972) provides that, "No director shall be removed from office, unless by a vote of two-thirds of the members, or of stockholders holding two-thirds of the capital stock, at a general meeting held, after notice of the time and place, and of the intention to propose such removal. Meetings of stockholders for this purpose may be called by the president, or by a majority of the directors, or by members or stockholders holding at least one-half of the votes. Such calls must be in writing and addressed to the secretary, who must thereupon give notice of the time, place and object of the meeting, and by whose order it was called."

Sec. 964 (W. S., 976) provides that "When all the stockholders or members of a corporation are present at any meeting, however called or notified, and sign a written consent thereto on the record of such meeting, the doings of such meeting are as valid as if it had at a meeting legally called and noticed. The stockholders or members of such corporation, when so assembled, may elect officers to fill all vacancies then existing, and may act upon such other business as might lawfully be transacted at a regular meeting of the corporation."

Where a statute prescribes what matters, proceedings and business of a corporation may be regulated by its by-laws, the members are thereby precluded from enacting by-laws on any other subject, and, for a stronger reason, they can enact no legal by-laws in contravention of any statutory provision or of any provision of the charter or articles of incorporation.

10 Cyc., 355.

I. Thompson on Corporations, Sec. 1010 *et seq.*

Ireland *vs.* Globe Milling, Etc., Co. (R. I.), 32 Atl., 921.

Brewster *vs.* Hartley, 37 Cal., 15.

Kolff *vs.* St. Paul Fuel Exchange (Minn.), 50 N. W., 1036.

Bergman *vs.* St. Paul Mut. Bldg. Ass'n No. 1 (Minn.), 13 N. W., 120.

Presbyterian Assur. Fund *vs.* Allen (Ind.), 7 N. E., 317.

Brinkerhoff-Farris Trust, Etc., Co. *vs.* Home Lumber Co. (Mo.), 24 S. W., 129.

Carr *vs.* City of St. Louis, 9 Mo., 191.

Mutual Fire Ins. Co. *vs.* Farquhar (Md.), 39 Atl., 257.

Darrin *vs.* Hoff (Md.), 48 Atl., 196.

Pempel *vs.* Dodge (Tex.), 32 S. W., 514.

Hence, it necessarily follows that the attempt, by a so-called amendment of the by-laws of said Shawnee Compress Co. to reduce the number of directors thereof to three, at the special or called meeting of stockholders of April 24, 1905, even if said meeting had been legally called for the purpose of amending its by-laws, must be

declared an absolute nullity, for the reason that the number of the directors of a corporation shall be stated in its articles of incorporation, and the certified copy of the articles of incorporation of said Shawnee Compress Co. provides that the number of its directors shall be five (R., p. 184).

It is also evident that, at least five of the nine directors elected by the stockholders of said company at their last previous annual meeting were legally elected and (being stockholders) were in all respects qualified to fill the offices to which they had been elected, and, as none of them ever tendered his resignation, it is somewhat interesting, as well as novel to note the facility with which, at least, two of those so legally elected, qualified and acting were ousted from office or dispensed with by the passage of this resolution pretending to reduce the number to three, and this evidently for the purpose of enabling Messrs. Beatty and Stubbs to constitute a majority (therefore a quorum) of the board, and without any attempt whatever to comply, in any respect, with a single requirement of that section of the statute hereinbefore quoted providing for the removal of directors.

By one of the provisions of another section of our statute hereinbefore quoted, it is evident that the duration of the term of office of directors of corporations is one year and until their successors are elected and qualified; consequently the term of office of all those legally elected as directors of said company at the last preceding annual meeting of stockholders did not expire until the next annual meeting, which could not have been held

until the first Tuesday of June following the date of said special meeting.

See, also, Nathan *vs.* Thompkins (Ala.), 2 So., 747.

It is also apparent that the stockholders of the Shawnee Compress Co. had as much, if not more, authority to elect a board of directors consisting of nine members as they had to elect one consisting of only three. Consequently they had no power, at a special meeting of stockholders without any purpose whatever having been specified in the notice calling such meeting, to oust a portion of the members of said board otherwise than by the statutory proceedings provided for such removal, and this must have been strictly followed.

It is well settled that where a governing statute or the charter of a corporation prescribes the manner in which the power of removal of the members of its board of directors (or other officers) may be exercised, such method must be strictly followed, if (in fact) a judicial inquiry is not essential for such purpose, and said officers cannot be disfranchised in any other way.

10 Cyc.

State *vs.* Trustees of Vincennes University, 5 Ind., 77.

Southern Plank Road Co. *vs.* Hixon, *Ibid*, 165.

Copeland *vs.* Minong Mining Co., 33 Mich., 2.

See also, Detweiler *vs.* Commonwealth (Pa.), 18 Atl., 990.

State *vs.* Chamber of Co. of the City of Milwaukee, 20 Wis., 68.

Certainly, then, it must be conceded that the resolution passed at the special meeting of stockholders of

April 24, 1905, assuming to reduce the number of directors of said company to three, and thereby to oust all others elected at the said preceding annual meeting of stockholders, is absolutely void, hence there were other legally elected directors of said company than Messrs. Beatty, Stubbs, and F. E. Anderson, whose terms of office did not expire until the following annual meeting of stockholders, and the undisputed evidence of Mr. Beatty himself shows that the only parties notified of the special or called meetings of directors of April 26 and May 1, 1905, at which it was attempted (in a way) to ratify the action of the special stockholders' meeting of April 24, 1905, and the action of the committee appointed thereat, in authorizing the execution of said lease contract, were Messrs. Stubbs and F. E. Anderson, besides himself. And there is, perhaps, no more firmly established rule of law than that notice of a special or called meeting must be given to all members of the board of directors of a corporation, so that each will have an opportunity to attend, in order to render any of the proceedings had thereat valid, for the reason that "Every director is entitled to the reasoning, judgment and advice of every other director, and can not be deprived therefrom through failure to give notice. So the stockholders are entitled to have the corporate business conducted in view of the experience and wisdom of all the directors, and of this right they can not be deprived by the arbitrary will of a quorum."

Singer *vs.* Salt Lake City Copper Mfg. Co. (Utah), 53 Pac., 1024.

See also, Doernbecher *vs.* Columbia City Lumber Co. (Or.), 28 Pac., 899.

Hill *vs.* Rich Hill Coal and Min. Co. (Mo.), 24 S. W., 223.

Commonwealth *vs.* Cullen, 13 Pa. St., 133.

Pauly *vs.* Pauly (Cal.), 40 Pac., 29.

First Nat. Ba. *vs.* Asheville Furniture and Lum. Co. (N. C.), 21 So., 948.

Vaught *vs.* Ohio Co. Fair Co. (Ky.), 40 S. W., 426.

Harding *vs.* Vandewater, 40 Cal., 78.

3 Clark & Marshall on Corporations, Sec. 680, p. 2082.

Curtin *vs.* Salmon River Hydraulic Gold Min. and D. Co., *supra*, 62 Pac., 552.

People *vs.* Batchelor, 22 N. Y., 129.

In Vaught *vs.* Ohio County Fair Co., *supra*, it is held that "Proceedings at a special meeting held by a bare majority of the board of directors, without notice to the other members, are void, although all of those present voted in favor of the action taken, and the result would have been the same had the other members been present."

As before seen by the undisputed evidence in the case at bar, the special meeting of the board of directors of said Shawnee Compress Co., held on April 26, 1905, was only attended by two of the five directors required by the articles of incorporation, to-wit: Messrs. Beatty and Stubbs, and that held on May 1, 1905, while attended by three members thereof, to-wit: Messrs. Beatty, Stubbs and F. E. Anderson, the latter not only refused to participate in the proceedings attempted to be taken thereat,

but filed a written protest (R., 22) denying the authority of the parties assuming to represent said corporation as its board of directors to take any legal action upon any matter coming before said meeting.

We also think it important to note, in this connection, that the reason assigned in the resolution offered by Mr. Beatty for attempting to reduce the number of the directors of said company from nine to three, was because the articles of incorporation and charter of said company "fixes the number of the board of directors of said corporation at three" (R., 15–202); and he based his claim, in this regard, upon the statement contained in the alleged telegram from William Grimes, as Secretary of Oklahoma, to one C. J. Benson (R., 183); but it is evident that the statement contained in said alleged telegram, to the effect that the board of directors of said company should consist of only three members, is false, as the duly certified articles of incorporation requires that said board shall consist of five members; but as to whether or not Mr. Beatty, and some of his associates who were most active in urging the execution of said lease contract, knew this statement to be false at the time, the evidence does not disclose. However, putting this matter in the most favorable light for the contention of appellants, it must be admitted that the action of the stockholders in passing said resolution was caused by a mutual mistake of fact, as to the actual number of directors required by said articles of incorporation, and this mistake will suffice to render the action so taken by said

stockholders (at least) voidable at the election of any one or more of them upon the discovery of the mistake.

9 Cyc., 397.
16 Cyc., 733.

Again, as before seen, neither the notice calling the special meeting of stockholders nor either of those calling the special meetings of said pretended board of directors of April 26 and May 1, 1905, stated any purpose whatever for which any of said meetings had been called.

At a special meeting either of the stockholders or the directors of a corporation, called by a notice of this character, only the ordinary business of such corporation can be legally transacted.

Mutual Fire Ins. Co. *vs.* Farquhar, *supra*, 39 Atl., 527.
10 Cyc., 785.
Peoples' Mutual Ins. Co. *vs.* Westcott, 80 Mass., 440.
Mercantile Library Hall Co. *vs.* Pittsburg Library Ass'n, 33 Atl., 714.
In the Matter of Long Island R. R. Co., 19 Wend. (N. Y.), 37.

As is well said in the opinion of the case, In the Matter of The Long Island Railroad Co., *supra*, "The statute providing for long notice to the stockholders should be liberally expounded; it enables them to qualify for the election; tends to promote a full assemblage, and thereby guards against contrivance, and the ill effects that may result from partial representation."

As shown by all the testimony bearing upon the subject, and as directly stated by Mr. B. L. Anderson, one of

the plaintiffs, the lease proposition made by Mr. Hanson and submitted at said stockholders' meeting by Mr. Beatty, "was absolutely cut and dried" (R., 166); and, as none of the appellees had any knowledge of the fact that such a proposition be sprung, their representatives at such meeting were naturally taken by surprise, and thereby placed at a very great disadvantage in combatting same, and this is the most potent reason for requiring that the notice calling a meeting of stockholders of a corporation for such an extraordinary purpose should not only be given in due time, but should state the purpose for which such meeting is called.

Of course the special meeting of stockholders called for and held on April 24, 1905, had all of the stockholders of said Shawnee Compress Co. been present, could have legally acted upon said lease proposition by said stockholders complying with the requirements of said section 964 (W. S., 976), hereinbefore quoted, by each signing a written consent to the holding of such meeting on the records thereof, but as there was no pretense at compliance with the provisions of said section, it surely must follow that all of the proceedings taken at said meeting relative to the authorization of the execution of said lease contract must be declared void.

Furthermore, the meeting of stockholders of April 24, 1905, was not called in compliance with the requirements of Sec. 4, of Article 3, of the by-laws of said company, which provides that, "Special meetings of the stockholders shall be called by the secretary by mailing a notice, at least ten days prior to the date of such meet-

ing, to each stockholder, at the request in writing, or by vote of the majority of the board of directors, or at the request in writing by stockholders of record owning a majority in amount of the outstanding capital stock of the corporation" (R. 202).

In fact, no effort whatever seems to have been made by Mr. Beatty and those other stockholders of the Shawnee Compress Co. assisting him in the efforts to bring about the negotiation and execution of said lease contract to comply with any of the provisions of the existing by-laws of said company, or with any statutory provision applicable to the proceedings being taken, but, on the contrary they, with apparent "malice aforethought," acted in direct contravention of nearly all of such provisions.

Counsel for appellants in their brief, page 54, say:

> "It is important at the very outset of a discussion of these matters to bear in mind that the plaintiffs, appellees herein, Andersons, were present at all the meetings in which any action was taken upon the matter of executing the lease in controversy. The appellees by attending and participating in a meeting waived the failure of notice to apprise them of the purpose of the meeting."

Counsel are in error in two particulars.

1. They have misstated the facts.

2. They have failed to state the law applicable to this case.

The law governing the legality of the stockholders' meeting of April 24, 1905, is statutory. The Oklahoma

Statutes, Sec. 964 (W. S., 976), provides that, "When all the stockholders * * * of a corporation are present at any meeting, however called or notified, and sign a written consent thereto on the record of such meeting, the doings of such meeting are as valid as if had at a meeting legally called and noticed." Some of the stockholders were not present at that meeting and a written consent thereto on the record of the meeting was not signed by those present. The law having provided specifically how such irregularities may be waived, no attempted waiver in any other manner will be effectual, and any pretended waiver thereafter by non-attending stockholders is of no consequence.

The record shows that neither B. L. Anderson nor any other member of the firm of Neil P. Anderson & Co. attended either of the meetings of the newly selected so-called board of directors following the said stockholders' meetings, at which meetings of said board Beatty and Stubbs attempted to authorize the execution of said lease or ratify the action of the committee appointed by said stockholders' meeting in negotiating the same. Both Andersons voted against said action looking to a lease, and therefore were not committed to it in any way. Furthermore, B. L. Anderson held the proxy for his firm, Neil P. Anderson & Co., and F. E. Anderson held proxy for Anderson, Clayton & Co. This court, in the case of Scovill vs. Thayer, 105 U. S., 143, held that there cannot be estoppel by proxy when the act was illegal.

It therefore follows that if the Andersons had voted

for the illegal act instead of against it the appellees here would not have been estopped and bound by their action. The firms were the stockholders and not the Andersons individually. "A stockholder in a corporation is not estopped from questioning the validity of a stockholders' meeting by reason of his participation in the proceedings by proxy, as his agent was only authorized to act at lawful meetings." Mathews *vs.* Columbia Nat. Bank., 79 Fed., 558. The meeting of April 24, 1905, was not lawful for the transaction of the business attempted to be transacted. F. E. Anderson appears to have been in the room, but to have taken no part in the meeting immediately following the said stockholders' meeting. Neither was he nor any member of his firm present at the meeting of April 26. While present at the meeting May 1, 1905, he filed at the outset his written protest and took no part in the meeting otherwise.

Peoples Mutual Ins. Co. *vs.* Westcott, 80 Mass., 440.

June 17, 1904, at the annual meeting, nine directors were elected for one year. By the undisputed evidence C. J. Benson and B. L. Anderson were so elected. At least five were legally elected; none resigned and none had been removed. No stockholders had complained of the number. In fact, the next stockholders' meeting was the meeting of April 24. Then what was the status of the nine directors?

Thompson on Corporations, 3 Sec., 3924, says: "The action of the directory of a corporate body composed of a greater number than allowed by the charter is none

the less valid and binding if the stockholders do not complain, but acquiesce."

It therefore follows that they remained directors until the annual meeting in June, 1905. Oklahoma Stat., 1893, Sec. 953, provides that: "Directors of a corporation must be elected annually by the stockholders or members, and if no provision is made by the by-laws for the time of election, the election must be held on the first Tuesday in June." Section 954, provides that: "At the first meeting at which by-laws are adopted, or at such subsequent meeting as may then be designated, directors must be elected to hold their offices for one year, and until their successors are elected and qualified."

Article 3, Section 1, of the by-laws adopted in stockholders meeting June 17, 1904, is as follows: "The annual meeting of the stockholders of this corporation shall be held on the first Tuesday in June each year, at the office of the corporation in Shawnee, Okla., when they shall elect by a plurality vote by ballot, the board of nine directors to serve for the ensuing year" (R., 201).

Singularly enough, when an attempt was made to amend this by-law April 24, 1905, the following is the result:

"Section 1. The annual meeting of the stockholders of this company shall be held on the first Tuesday of June in each year, at the office of the corporation in Shawnee, Oklahoma Territory, when they shall elect by plurality vote, by ballot, a board of three directors to serve for the ensuing year. And that said original section 1 of article 3 be and the same is hereby repealed" (R., 203).

Either the original section or the amended section was in force at the time of the said stockholders' meeting April 24, 1905, and was the law of the corporation at that time, and by which it was bound.

The conclusion is obvious that said pretended election April 24, 1905, violated both the law of the Territory and the by-laws of the corporation. Whatever might have been the power of the stockholders to change the time of election of directors they did not make the change. It follows that the election was illegal.

In Nathan vs. Thompson (Ala.), 2 So., 747, the rule upon the question of the legality of an attempted election of directors prior to the expiration of their terms of office is stated as follows: "In Alabama the election and term of office of the directors and officers of street railway companies are governed by code; secs. 1923, 1925, which contemplate only annual elections; and a majority of the directors of such a corporation cannot, by changing the time of the annual meeting of the stockholders, change such term, and authorize an election by the stockholders of a new board before the term as limited by the statute has expired."

Section 960 of our statute provides the only method for the removal of directors, and further provides that: "In case of removal, the vacancy may be filled by an election at the same meeting." But, as clearly shown by the record in the case at bar, and, as we think, fully understood by counsel for appellants, the holders of a majority of the stock of the Shawnee Compress Co. assumed not only to reduce the number of directors

required by the articles of incorporation of said company, but to elect an entirely new board of directors therefor at a special stockholders' meeting held long prior to the expiration of the term of office of the board elected at the previous annual meeting, by the passage of a mere resolution purporting to amend the by-laws of said company, and this without any notice having been given to the stockholders of the purpose for which said meeting had been called. Surely it needs no further argument to show that this entire proceeding is utterly void under the provisions of the statute of this Territory referred to hereinbefore.

V.

The trial court erred in admitting, on behalf of appellants, certain incompetent testimony over the objection of appellees, to which said rulings appellees at the time duly excepted.

Under this head we shall only very briefly call attention to a few of the rulings of the trial court in the admission of testimony wherein we believe prejudicial error was committed.

On page 87 of the record is found the following question, objection, ruling and answer in the testimony of Mr. Beatty during his examination in chief for appellants:

> "Q. What has been the financial condition of the Shawnee Compress Company during the last year?
>
> "Mr. Keaton: Objected to as incompetent, irrelevant and immaterial. Overruled. Exception.

"A. The company since—even before my firm became a stockholder—has been in a bad condition financially, as shown by the books of the company that were turned over to me, and I investigated before my firm bought the stock."

In the first place, the foregoing question calls for and the answer states a mere conclusion of the witness, and this is based largely upon an examination of the books of the Shawnee Compress Co., which were never introduced in evidence, and, in the second place, the testimony is incompetent, in any event, to any material issue involved in the case.

As shown in page 92 of the record the court permitted the same witness, over the objection of counsel for plaintiff, to give a conversation between himself and Mr. Benson (being two members of the committee appointed at the special meeting of stockholders of April 24, 1905), representing the Shawnee Co., and Mr. Hanson, representing the Gulf Compress Co., as to terms which were to be included in the lease contract, which said ruling, we think, was erroneous.

As shown on page 94 of the record, the court permitted said witness, over the objection of counsel for plaintiffs on the grounds that said testimony was incompetent, irrelevant, immaterial, leading and suggestive, to state his conclusion, to the effect that it was absolutely necessary to lease the property, good will, etc., of said Shawnee Compress Co. in order to pay the indebtedness thereof, in which, we think, prejudicial error was also committed.

Again the court permitted a certain purported tele-

gram from William Grimes, as Secretary of Oklahoma Territory, to one C. J. Benson, which was produced at said special meetings of stockholders and at the trial of this cause by Mr. Beatty, stating that the number of the board of directors of said Shawnee Compress Co. is three, to be introduced in evidence, without any further identification thereof or foundation being laid therefor, and over the objection of counsel for plaintiffs on the grounds that it was incompetent, irrelevant and immaterial and not the original telegram and not the real signature of the party (R., 117, 121 and183).

In admitting this testimony we think the trial court undoubtedly committed prejudicial error, as a telegram was certainly not the proper character of evidence to prove the fact stated therein; and, furthermore, had it been competent, no proper foundation was laid for its introduction. The only purpose for which it could have been introduced was to dispute the statement contained in the duly and properly certified copy of the articles of incorporation of the Shawnee Compress Co., which had previously been introduced in evidence, showing that the number of members composing the board of directors of said company must be five, and it seems that the court must have relied on the statement contained in the telegram in preference to that contained in said copy of the articles of incorporation. Otherwise it seems that he could not possibly have held any of the proceedings had at the pretended special meetings of the board of directors of said company, held on April 26 and May 1, 1905, to be legal and valid, and therefore binding upon these appellees and said company.

VI.

In the second division of the argument of counsel for appellants an effort is made to avoid the consequences of their own illegal acts by an unwarranted and unjustifiable attack on the Andersons. The record discloses no act upon the part of the appellees which could call for the application of the principle attempted to be invoked by counsel.

The rule that a suitor must come into equity with clean hands has been thus stated:

> "Equity will not at the suit of one of the fraudulent parties, while the agreement is executor, compel its execution, or decree its cancellation, nor after it is executed set it aside and restore such party to the property or other interests which he has fraudulently transferred."

Wheeler *vs.* Sage, 1 Wall., 518.

Where complainants do not come into court with clean hands, and are seeking the benefit of a contract obtained by their fraud, deceit or unfair means, they can have no standing in a court of equity.

Kitchen *vs.* Rayburn, 19 Wall., 254.

If the Andersons, therefore, procured the execution of this illegal contract by fraud and are seeking the benefit of said contract they are in court with unclean hands.

There are just two insurmountable difficulties in bringing the Andersons within the rule.

1. They did not procure the execution of the contract by fraud or otherwise.

2. They are not seeking any benefit under the said contract.

On the other hand, the appellees did all they could within reason to prevent the execution of the said contract, and are not seeking any benefit under it, but are seeking to have it annulled.

Counsel for appellants state that the plant had been operated the preceding year by Beatty and Stubbs, "owners of a majority of the stock" (not owners of a majority prior to April 11, 1905), at a loss of $2,042.53. That statement is in direct conflict with Appellant Beatty's testimony that the net earnings for that year was $7,386.05 above the insurance and whatever taxes were paid. (R., 104 and 105.) The company expended for improvements $4,956.50, and permanent equipment $413. (R., 104.) At page 88 of record, counsel for appellants asked said Beatty this question:

> "Q. At the time (early in April, 1905) that you went to Memphis to see Mr. Hanson, what was the condition of the compress at that time?
>
> "A. The company had had one season's business and as best we could estimate it, was about $7,000 better off than we were before."

Nor are the succeeding statements made by counsel in accord with the facts. Beatty did testify that B. L. Anderson told him that he was interested in twenty compresses. Mr. Anderson testified that was untrue—that he was interested in fourteen in all, nine in Texas and five in the two Territories.

F. E. Anderson's firm was interested in but one, the

one at Shawnee. They are merely minority stockholders in this compress, and it is believed are not majority stockholders in any compress. They became interested in this plant at the instance of Beatty, who went to Fort Worth to influence Neil P. Anderson & Co. to buy stock in it. After purchasing the stock they sent all the cotton to the plant they could send there, paid all assessments levied on their stock, and stood ready to obtain financial assistance to the extent of procuring sufficient money to take up the indebtedness due by the Shawnee Compress Company. They did not attempt to purchase nor offer to purchase the plant until the request was made by Mr. Douglas, who sent a letter to F. E. Anderson, and at the conference which followed Douglas asked the Andersons to buy (R., 152, 197). Douglas was treasurer of the Shawnee Compress Co. (R., 153).

An offer was made to buy the plant outright or to purchase stock up to 400 shares. The offer they made was deemed by them to be a fair one, and that position is strengthened by the sale of stock theretofore, the statutory obligations a stockholder assumes and the indebtedness due by the company. There was nothing in these or any other acts of the appellees which violated any provision or policy of either statutory or common law.

F. E. Anderson is not a member of the firm of Neil P. Anderson & Co., and B. L. Anderson is not a member of the firm of Anderson, Clayton & Co., and did not represent it in any compress companies. Anderson, Clayton & Co. were interested as stockholders in one compress only. So the statement of counsel for appellants, on page 35 of their brief, is untrue.

The most striking feature of the appellants' brief on this branch of the case is the continued gross misrepresentations of fact. The Andersons did not press their offer to buy, nor did they threaten the company with competition.

There is absolutely no testimony tending to show that any of appellees threatened to build a competing press at Shawnee so long as the business of the Shawnee Compress Company was conducted by its own managing officers. The statement of B. L. Anderson to Mr. Hanson, both in his telegram and verbally, being that "If you lease Traders' Company will build immediately Shawnee and Oklahoma City." The only testimony referring to the matter of building in the event that the lease contract to the Gulf Compress Company was not consummated is that of Mr. Beatty, in which he states: "My conversation with Mr. B. L. Anderson, in which Mr. F. E. Anderson was present, was to the effect that I asked Mr. Anderson if he would agree not to erect a press in Shawnee for the next five years if we wouldn't agree to lease; he says 'no.' I says, 'will you agree not to erect a press within the next twelve months if we agree not to lease,' and he says 'we will not,' and I said, 'well, I am certainly going to lease this press.'" (R., 137.)

The record discloses that B. L. Anderson had no authority to make any such agreement as was suggested by Beatty.

Appellants, on page 39 of their brief, take occasion to criticise the conduct of the Andersons at the stockholders' meeting, April 23, 1905 (doubtless meaning April

24, 1905). It is said none of the stockholders present, except the Andersons, knew the "number of directors required under the charter."

It is said the Andersons knew how many were required but there is not a syllable of testimony that they did know.

They were non-residents and had been stockholders since June, 1904.

The articles of incorporation of the Shawnee Compress Company and amendments thereto show that on or about the 17th day of July, 1899, C. M. Cade, W. S. Search, J. M. Aydelotte and A. J. Dossett made application for the incorporation of said company, with a capital stock of $11,000.00, and that thereafter, and on or about the 13th day of November, 1899, an application was made, by the same parties, to increase the capital stock of said company to $16,000.00; that thereafter, and on the 10th day of June, 1901, J. M. Aydelotte, A. M. Graves, A. E. Nelson, C. J. Benson, H. T. Douglas, D. M. Cheatham and John M. Butcher, as stockholders thereof executed a written authorization to the directors of said company to still further increase its capital stock from $16,000.00 to $50,000.00, and on July 1, 1901, C. J. Benson, as secretary of said company, made application to the Secretary of the Territory for such increase (R., 145).

The certified copy of the articles of incorporation introduced in evidence by plaintiffs in the case at bar was made by the Secretary of the Territory on April 26, 1905 (R., 184).

It is apparent that if, as must be considered altogether likely, this certified copy was mailed to plaintiffs or their attorneys they could not have received same until late in the afternoon of the 26th or the morning of the 27th of said month, hence, there being absolutely no other testimony relating to the matter, it is pertinent to ask by what authority do counsel for defendants assume that plaintiffs had knowledge of the fact that five directors were required by the articles of incorporation at the special meeting of stockholders held on April 24, 1905? In this connection it is certainly also pertinent to suggest that the original certificate or patent, issued by the secretary when said corporation was organized, should show the number of directors specified in the articles of incorporation, and should, as well as a copy of said articles, be in the possession of the secretary thereof, especially as no showing was made at the trial that either of them was lost or mislaid. Furthermore, there is absolutely no foundation in fact for the statement of counsel contained in their brief to the effect that the secretary of the Shawnee Compress Company wired Secretary Grimes, as there is nothing whatever to show that anybody wired Mr. Grimes, but the pretended telegram introduced in evidence was one purporting to have been sent by Mr. Grimes to C. J. Benson, who was not the secretary of the Compress Company at the time, but appears to have been secretary thereof at the time the capital stock was increased from $16,000.00 to $50,000.00. However, the telegram was produced both at the stockholders' meeting of April 24, 1905, and at

the trial of this cause by Mr. Beatty, who claimed to be and was acting as secretary of said company on both dates, and without any further identification than Mr. Beatty's mere statement that it was from Mr. Grimes.

Viewing the testimony in the most favorable light for the appellants, the most that can be said is that the parties composing the firm of Neil P. Anderson & Company, who were also stockholders in the Traders Compress Company, were willing, perhaps desirous, of purchasing either the physical property of the Shawnee Compress Co. or a majority of its stock, but this fact surely cannot legitimately be construed into a conspiracy to depress the value of the stock and to strangle the business of said company so as to coerce such a sale. In fact, the testimony of the star witness on behalf of the defendants, to-wit, Mr. Beatty, who was acting as secretary of said company, shows that, during the season of 1904–5, plaintiffs shipped to said plant for compression between ten and twelve thousand bales of cotton, of which the firm of Neil P. Anderson & Co. handled about six thousand bales, and F. E. Anderson testifies that he not only did nothing to depress the price of the stock of said company or to embarrass its business operations but that he "had done what I could all the year to feed the compress and to put all the cotton into the Shawnee Compress that could go there through the whole season"; and B. L. Anderson testifies practically to the same thing.

That it was not necessary, under the facts disclosed by the pleadings and evidence in the case at bar, for appel-

lees to have made a formal demand on the parties assuming to act as the majority members of the board of directors to prosecute this action or to take any other steps to rescind the illegal actions taken in the matter of authorizing and executing the lease contract complained of, is not only held by many of the cases cited heretofore, but is clearly established by the following cases:

Montgomery Traction Co. *vs.* Harmon (Ala.), 37 So., 371.

Northern Trust Co. *vs.* Snyder (Wis.), 89 N. W., 460.

McConnell *vs.* Combination M. & M. Co. (Mont.), 76 Pac., 194.

Shoening *vs.* Schwenk (Io.), 84 N. W., 916.

Appleton *vs.* American Malting Co. (N. J.), 54 Atl., 454.

Rogers *vs.* Nashville, C. & St. Ry. Co., Fed. 299.

People's Mutual Ins. Co. *vs.* Westcott, 80 Mass. (14 Gray), 440.

See also on this question of estoppel:

German Safety Vault & Trust Co. *vs.* Boynton, 71 Fed., 797.

Durkee *vs.* People (Ill.), 40 N. E., 627.

Byrne *vs.* Schuyler Elec. Mfg. Co. (Conn.), 31 Atl., 833.

Kolff *vs.* St. Paul Fuel Ex. (Minn.), 50 N. W., 1036.

Hill *vs.* Rich Hill Min. Co. (Mo.), 24 S. W., 223.

In Koliff *vs.* St. Paul Fuel Ex., *supra*, it is held that—

"Mere failure of a stockholder to object to void by-laws until attempt is made to enforce them

against him does not estop him to object to them;" and in Hill *vs.* Rich Hill Min. Co., *supra*, it is held that "The mere presence of a director owning a majority of stock at a meeting held without notice does not make such meeting, nor contracts entered into thereat, valid."

In fact, it seems clear that neither of the co-partnership firms constituted by appellees are estopped from alleging the invalidity of the proceedings had, especially of the alleged newly elected board of directors, authorizing the execution of said lease; and as heretofore shown and not disputed by counsel for appellants, it was absolutely necessary, to the validity of said lease, that same be authorized by a legally constituted board of directors at a legally called meeting for that purpose, and that the stockholders, if all had been notified of the purpose of a meeting called to authorize such a lease, could not, by a unanimous vote, have done so independently of any action taken thereon by the board of directors of said company.

Gashwiler *vs.* Willis, 33 Cal., 12.

The appellees are in court with clean hands asserting rights given to them by the law in the way the law prescribes.

From the foregoing considerations the judgment of the Supreme Court of the Territory of Oklahoma should be affirmed:

I. Because the pretended lease contract is illegal under the law applicable thereto, for the reason that it is in restraint of trade and competition.

II. Because said pretended lease contract is *ultra vires* and therefore void.

III. Because said pretended lease contract was executed by parties assuming to represent the Shawnee Compress Company, not for the best interests of the corporation, but to advance their own private interests, and is therefore void at the suit of appellees, non-assenting stockholders.

IV. Because the proceedings leading up to the execu tion of said pretended lease contract were illegal and therefore void.

V. Because the appellees were entitled to a reversal of the trial court by reason of the erroneous admission of testimony over the objection of appellees to which exceptions were duly taken and noted.

VI. Because appellees are entitled to the relief prayed for in their petition and amended petition.

Respectfully submitted.

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WASHINGTON, D. C.,
January 18, 1908.